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United States Supreme Court.

In the Matter

of

EDWARD M. FULLER and WILLIAM F. McGEE, individually and as copartners doing business under the name of E. M. FULLER & CO.,

Bankrupts.

APPLICATION FOR A STAY PENDING APPEAL.

FALLON & McGEE,
Attorneys for Defendants-in-Error,
152 West 42nd Street,
New York City.

Court Press, N. Y. C.

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United States Supreme Court. 1

In the Matter

of

EDWARD M. FULLER and WILLIAM F. McGEE, individually and as co-partners doing business under the name of E. M. Fuller & Co.,

Bankrupts.

Notice of Motion for Stay, Pending Appeals. 2

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavit of Eugene F. McGee, verified the 26th day of April, 1923, and upon the certified copy of the record on appeal filed with the Clerk herein, and upon all the papers and proceedings herein, application will be made to the Supreme Court of the United States, at the Court Room, Washington, D. C., on the 27th day of April, 1923, at the opening of Court on that day or as soon thereafter as counsel can be heard, for an order of the Court that until the hearing and determination of the appeals to this Court 3
from the orders of the United States District Court for the Southern District of New York, dated April 20th, 1923, and April 24th, 1923, that George C. Sprague, Esq., Trustee in Bankruptcy herein, be enjoined and restrained from delivering the books of account, papers and other documents of every kind whatsoever belonging to said bankrupts E. M. Fuller and William F. McGee, individually and as co-partners doing business as E. M. Fuller & Co., to any District Attorney, State or Federal, or any

Notice of Motion for Stay, Pending Appeals.

Grand or Petit Jury, or agents of any District Attorney, or any other person, or from permitting the inspection of such books and documents by any District Attorney, State or Federal, or any other person, or from permitting any District Attorney or their agents, or any Grand or Petit Jury, from making and obtaining copies or excerpts from said records, and that the said George C. Sprague, Esq., Trustee herein, be directed to hold said papers of said bankrupts only for the purpose of the civil administration of the bankrupts' estate and in accordance with the terms of the stipulation entered into between the attorneys for the alleged bankrupts and Samuel Strasbourger, Esq., Receiver herein, and for no other purpose whatsoever, and for such other and further relief as to this Court may seem just and equitable.

Dated, April 26th, 1923.

FALLON & McGEE,
Attorneys for Defendants-in-Error,
152 West 42nd Street,
New York City.

To:

SAMUEL STRASBOURGER, ESQ.,
Receiver.

GEO. C. SPRAGUE, ESQ.,
Trustee.

FRANCIS L. KOHLMAN, ESQ.,
CARL J. AUSTRIAN, ESQ.,
Attorneys for the Trustee.

HON. JOAB H. BANTON,
District Attorney, New York County.

Affidavit of Eugene F. McGee.

7

SUPREME COURT OF THE UNITED STATES.

In the Matter

of

EDWARD M. FULLER and WILLIAM F. McGEE, individually and as co-partners doing business as E. M. Fuller & Co.,

Bankrupts.

8

United States of America
Southern District of New York—ss.:

EUGENE F. McGEE, being duly sworn, deposes and says:

That he is a member of the firm of Fallon & McGee, of 152 West 42nd Street, New York City, of counsel for the above-named bankrupts.

That on the 26th day of June, 1922, a petition in involuntary bankruptcy was filed against the said Edward M. Fuller and William F. McGee, individually and as co-partners doing business as E. M. Fuller & Co.

9

That thereafter Samuel Strasbourger, Esq., was appointed Receiver of the assets, property and effects of said bankrupts, and thereupon demanded that the bankrupts turn over to him their books of account, records, documents, and also the books of accounts, record, documents and papers of E. M. Fuller & Co.

That said bankrupts, claiming that said books, records and documents would tend to incriminate them and subject them to criminal prosecution, refused to de-

liver and turn over said books, records and documents to said Receiver unless the said Receiver agreed and stipulated that said books were to be used in connection with the civil administration of the bankrupts' estate only.

That thereafter a stipulation was entered into between the receiver and the attorneys for the bankrupts, pursuant to which the books, records and documents of said bankrupts and of the firm of E. M. Fuller & Co., were turned over to the receiver, solely for the civil administration of the bankrupts' estate, to enable the receiver to check up the assets and liabilities of the bankrupt firm, and with the understanding that said books, records and documents were to be held in trust by the receiver for the bankrupts and were to be returned to them upon the completion of his inspection, and with the further understanding that said books and records would not be turned over to any District Attorney, either State or Federal, or used before any grand or petit jury, either State or Federal, in any proceeding of a criminal nature against the firm of E. M. Fuller & Co. or any member thereof. That a copy of said stipulation is hereto annexed and made part of this affidavit, and marked Exhibit "A".

That thereafter, the District Attorney of the County of New York attempted to subpoena said books, records and other documents from the receiver, and thereupon an order was entered herein by Hon. Augustus N. Hand, District Judge, enjoining the receiver from turning over the books, records, documents and papers of Edward M. Fuller and William F. McGee, individually and as copartners doing business as E. M. Fuller & Co., to Hon. Joab H. Banton, District Attorney of the County of New York, or to any other District Attorney. A copy

of this order is hereto annexed and made a part of this affidavit, and marked Exhibit "B". 13

That thereafter and on April 6th, 1923, the attorneys for the bankrupts made a written demand upon the receiver for the return of the said books, records and documents upon the ground that the receivership having terminated, the bankrupts were entitled to immediate possession of the books. A copy of this demand is hereto annexed and made part of this affidavit, and marked Exhibit "C".

That thereafter the trustee in bankruptcy petitioned Hon. Harold P. Coffin, the Referee in bankruptcy herein, for an order directing the receiver to deliver to the trustee of the above named bankrupts all books of account, papers and other documents belonging to said bankrupts. In opposition to said petition of the trustee herein, the bankrupts filed with the referee a petition objecting to the delivery of the bankrupts' books and records to the trustee, without a condition providing that such books, records and documents should not be used against the bankrupts in any criminal proceeding, and limiting the use of the books by the trustee to the civil administration of the bankrupts' estate, and for no other purpose whatsoever, claiming that the unqualified and unrestricted delivery of the books to the trustee would amount to the violation of their constitutional rights guaranteed them by the 4th and 5th Amendments to the Constitution of the United States, as said books and documents contained entries and records which might tend to incriminate said bankrupts and subject them to criminal prosecution. 14 15

That thereafter an order was entered by said referee directing the receiver to deliver the books to the trustee without any qualifications or restrictions. That a copy

16 of said order is hereto annexed and made part of this affidavit and marked Exhibit "D".

That thereafter the bankrupts filed with said referee their petition to review said order and also exceptions to said order, setting forth in detail the manner in which said order was erroneous. A copy of said petition to review and of said exceptions filed by the bankrupts to said order are hereto annexed and marked Exhibits "E" and "F."

That thereafter and on the 21st day of April, 1923, an order was entered herein by Hon. Julian W. Mack, confirming the order of the referee directing the receiver
17 to turn all books, papers and documents of the bankrupts over to the trustee, and dismissing the petition of the bankrupts to review said order, and also denying to the bankrupts herein an application made by them for a stay pending the appeal to this Court. That a copy of said order is hereto annexed and made a part of this affidavit, and marked Exhibit "G." A copy of Judge Mack's opinion is hereto annexed and marked Exhibit "H."

That thereafter all papers in the hands of the receiver were turned over to the trustee in bankruptcy, together with certain receipts held by the receiver for papers of the bankrupts which had been delivered by the receiver
18 to Hays, St. John & Moore, attorneys for the bankrupts before the appointment of the trustee.

That thereafter a petition was filed by the trustee in bankruptcy asking that Hays, St. John & Moore, and Fallon & McGee, attorneys representing the bankrupts, be directed to turn over all papers belonging to the bankrupts which had been delivered to them by the receiver. Thereupon certain affidavits were filed by the said attorneys showing that certain of these papers had been

turned over to the bankrupts under the terms of the stipulation entered into between the receiver and the attorneys for the bankrupts, and that said bankrupts objected to turning over said papers, claiming that to do so would be in violation of their constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States. 19

That thereafter and on the 25th day of April, 1923, Hon. Julian W. Mack entered an order compelling the bankrupts and their said attorneys to turn over to the trustee all papers belonging to the bankrupts then in their possession.

A copy of said order is hereto annexed and made part of this affidavit, and marked Exhibit "I". 20

That thereafter and on the 26th day of April, 1923, Hon. Julian W. Mack entered an order reversing his order of April 21st, 1923, insofar as same denied a stay to the bankrupts pending the application for a stay to this Court, and granted to said bankrupts an order staying his orders made on the 21st and 24th days of April, 1923, until action by the Supreme Court of the United States on the application for a stay could be made, provided said application was made to this Court for a stay on or before April 27th, 1923.

That a copy of Hon. Julian W. Mack's remarks on said hearing is hereunto annexed and marked Exhibit "J." 21

That the bankrupts herein have filed assignments of error and obtained leave to appeal to this Court, both from the order of April 21st, 1923, and the order of April 25th, 1923. The bankrupts herein have perfected their appeal, given the necessary bonds, and deposited the necessary cash with the Clerk of this Court for printing the record.

That one of the bankrupts, Edward M. Fuller, is now

on trial before Hon. Charles C. Nott, Jr., and a jury, in the Court of General Sessions of the Peace in and for the County of New York, under an indictment arising out of the business of the firm of E. M. Fuller & Co. That after the order of the United States District Court for the Southern District of New York had been made on the 21st day of April, 1923, denying the bankrupts herein a stay from said order, the District Attorney of the County of New York subpoenaed said books, papers and documents of E. M. Fuller & Co. from the trustee in bankruptcy, and on the 24th day of April, 1923, offered said books in evidence as against the defendant upon said trial. Hon. Charles C. Nott, Jr., announced his intention to admit said books in evidence, but on account of the fact that an application was to be made that afternoon before Hon. Julian W. Mack for a stay, adjourned the trial of said case until the 25th day of April, 1923.

That on the 25th day of April, 1923, Judge Mack having granted an application for a stay pending the application to this Court, Hon. Charles C. Nott, Jr., presiding at the trial of said criminal action, adjourned the same until the 30th day of April, 1923.

That this is the fourth trial upon said indictments found by the Grand Jury of the County of New York, the District Attorney of the County of New York having proceeded with the other three trials without the use of said books, and that the present trial was started before the order was made herein by the referee in bankruptcy, directing the receiver to turn over to the trustee all the books, papers and documents of E. M. Fuller & Co. without qualification or reservation.

That unless the application for a stay herein is granted, the bankrupts' rights and privileges under the Fourth and Fifth Amendments to the Constitution of the

United States will be destroyed, and the said bankrupts will be denied the privileges and guarantees to which they are entitled under said amendments. 25

That the Court of Appeals of the State of New York, in the case of People against Adams, 176 N. Y. 351, held that when the Court is engaged in the trial of a criminal case, it will not take notice of the manner in which witnesses have possessed themselves of private papers or any personal property which is material and offered in evidence, and that the protection offered by the Fourth and Fifth Amendments to the Constitution of the United States cannot be raised in a State court.

That unless said stay is granted, on account of the facts herein set forth, and on account of the difference in the administration of the law of the State and the law of the United States, each of the bankrupts herein will suffer irreparable damage. 26

Deponent therefore respectfully asks for an order pending the hearing and determination of the appeal herein from the order of the United States District Court for the Southern District of New York, directing the Trustee herein to use the books, documents and records of each of said bankrupts only for the purpose of the civil administration of the bankrupts' estate, and in accordance with the terms of the stipulation entered into between the said alleged bankrupts and Samuel Strasbourger, Esq., the Receiver herein, and for no other purpose, and for an order staying the said Trustee from delivering the said books, papers and other documents to the District Attorney of New York County or to any District Attorney, State or Federal, or any grand or petit jury, or any agent of any District Attorney, or to any other person, or from permitting the inspection of said books, documents and records by any District At- 27

torney, State or Federal, or any other agent, or any other person, or from permitting any District Attorney, State or Federal, from making and obtaining copies or excerpts from such books, documents and records, and for an order likewise staying said Trustee pending the hearing and determination of this application, and for such other and further relief as to the Court may seem just and proper.

That no previous application for the relief hereby asked for has been made.

EUGENE F. McGEE.

Sworn to before me this
26th day of April, 1923.

JOSEPH H. HAYS,
Notary Public,
New York County.

EXHIBIT A.

31

Stipulation.

Samuel Strasbourger, Esq.,
Receiver of E. M. Fuller & Co.,
50 Broad Street, New York City.

Dear Sir:

Re: *E. M. Fuller & Co.*

Pursuant to your demand and subject to your assent to the conditions contained in this letter, we shall turn over to you for your inspection, the books and records of the firm of E. M. Fuller & Co. and the individual 32
copartners thereof.

These books are being turned over to you solely for the purpose of the civil administration of the bankrupt estate and to enable you to check up the assets and liabilities of the bankrupt firm. They are to be held in trust by you for the bankrupts and to be returned to us upon the completion of your inspection. It is understood that no one shall have access to these books but the receiver, his attorneys and accountants.

We are reserving, moreover, all the constitutional rights of the bankrupts, E. M. Fuller & Co., and the individual copartners thereof, in regard to any use of the books in any criminal proceedings, and we reserve 33
the right to object to the use of these books and records as evidence against the firm of E. M. Fuller & Co. or any member thereof, on the ground that the said firm and the individual copartners thereof cannot be compelled to give evidence against themselves. The members of the firm of E. M. Fuller & Co. claim the right to immunity in the event that these books and records, or

any part thereof, are used or attempted to be used as evidence against them.

It is also further understood, that the books and records will not be used before any grand or petty jury, either State or Federal, in any proceeding of a criminal nature against the firm of E. M. Fuller & Co. or any member thereof. In case any subpoena or other process is issued for the purpose of obtaining possession of the books and records in the receiver's custody, the receiver agrees to immediately notify the bankrupt firm and the individual members thereof and to return the books to the bankrupts, and not to part with the possession of the same until the bankrupts have had an opportunity to raise the question of their constitutional privilege to refuse to furnish evidence against themselves, in the same manner as if the said books and records had remained in the possession of the bankrupts.

The above conditions and reservations cover not only the books and records of the bankrupt firm and the individual members thereof, now in the possession of the bankrupts and in their office, but also all books and records of the bankrupt firm and the individual members thereof, stored in warehouses or elsewhere.

Very truly yours,

(Signed) HAYS, ST. JOHN & MOORE.

(Signed) SAMUEL STRASBOURGER,
Receiver of E. M. Fuller & Co.

The above terms and conditions are assented to.

JLM:P

EXHIBIT B.

37

Order.

At a Stated Term of the United States District Court for the Southern District of New York, held at the Court Rooms thereof in the Post Office Building, in the Borough of Manhattan, City of New York, on the 7th day of August, 1922.

Present:—Hon. Augustus N. Hand, *District Judge*.

38

In the Matter

of

Edward M. Fuller and William F. McGee, individually and as co-partners, doing business as E. M. Fuller & Co., Alleged Bankrupts.

The alleged bankrupts having moved this Court for an order restraining Samuel Strasbourger as receiver of Edward M. Fuller and William F. McGee individually and as co-partners, doing business as E. M. Fuller & Co., 39
from turning over to Joab W. Banton, District Attorney of the County of New York, or to any Grand Jury convened in and for the County of New York, the books, records, documents and papers of said alleged bankrupts,

Now, upon reading the order to show cause, of Honorable John C. Knox, United States District Judge, dated July 10, 1922, the petition of Edward M. Fuller, duly verified the 10th day of July, 1922, the affidavit of James

Exhibit B—Order.

Louis Moore, duly verified the 10th day of July, 1922, and the stipulation dated June 27, 1922, between Samuel Strasbourger as receiver of Edward M. Fuller and William F. McGee individually and as co-partners doing business as E. M. Fuller & Co., and Hays, St. John & Moore, attorneys for the alleged bankrupts, which said stipulation is annexed to the petition of said Edward M. Fuller, and the petition in bankruptcy, and all the papers and proceedings heretofore had in the above matter, and said motion having regularly come on to be heard,

And after hearing Hays, St. John & Moore (William Abramson, of counsel) in support of said motion, and Joab W. Banton, District Attorney of the County of New York (Felix C. Benvenga, Deputy Assistant District Attorney, of counsel), in opposition thereto, and due deliberation having been had thereon, and upon filing the opinion of the Court, it is

ON MOTION of Hays, St. John & Moore, attorneys for the alleged bankrupts hereby

ORDERED, that Samuel Strasbourger, as receiver of Edward M. Fuller and William F. McGee, individually and as co-partners, doing business as E. M. Fuller & Co., be and he hereby is enjoined and restrained from turning over the books, records, documents and papers of Edward M. Fuller and William F. McGee individually and as co-partners doing business as E. M. Fuller & Co., to Joab W. Banton, District Attorney of hte County of New York, or any other person who may hereafter serve as District Attorney of the County of New York, or any Assistant District Attorney of the County of New York, or any agent or agents of the District Attorney of the County of New York, or to any Grand or Petty Jury convened in

and for the County of New York, and also from making 43
and delivering to the said District Attorney or Assistant District Attorney or to any Grand or Petty Jury, or any agents of the said District Attorney, any copies or excerpts, or giving any information which is or may be derived from said books or records; and it is further

ORDERED, that Samuel Strasbourger be and he hereby is restrained from turning over the books, records, documents and papers of said Edward M. Fuller and William F. McGee, individually and as co-partners, doing business as E. M. Fuller & Co., to any Federal District Attorney or Federal Assistant District Attorneys or to any Federal 44
Grand Jury, or for the purpose of aiding any criminal investigation or prosecution of the alleged bankrupts, and from making and delivering to any Federal District Attorney or Federal Assistant District Attorney, or to any Federal Grand Jury, any copies or excerpts or giving any information which is or may be derived from said books and records; and it is further

ORDERED, that Samuel Strasbourger, as receiver, be and he hereby is directed to use the books, records, documents and papers of Edward M. Fuller and William F. McGee, individually and as co-partners, doing business as E. M. Fuller & Co., only for the purpose of the civil ad- 45
ministration of the bankrupts' estate and in accordance with the terms of the stipulation entered into between the attorneys for the alleged bankrupts and said Samuel Strasbourger, and for no other purpose whatsoever.

AUGUSTUS N. HAND,
United States District Judge.

EXHIBIT C.

46

Letter to Trustee.

Apr. 6, 1923.

Samuel Strasbourger, Esq.,
50 Broad St., N. Y. City.

RE: E. M. FULLER & CO.

Dear Sir:

Under date of June 27, 1922, you, as receiver of E.
47 M. FULLER & COMPANY, entered into a stipulation with this firm, representing the above named bankrupts, pursuant to which the books of E. M. Fuller & Company were turned over to you solely for the purpose of the civil administration of the bankrupts' estate and were to be held in trust for the bankrupts by you and returned to us upon the completion of your inspection. It was further understood that no one should have access to these books but the receiver, his attorneys and accountants.

In view of the fact that your administration as receiver has terminated upon the election of the trustee, we hereby make demand upon you for the return of all
48 books, records, papers and documents which were delivered to you pursuant to the stipulation aforementioned.

Very truly yours,

HAYS, ST. JOHN & MOORE.

WA: mbm

EXHIBIT D.

49

Order.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

EDWARD M. FULLER and WILLIAM F. McGEE, individually and as co-partners, doing business as E. M. FULLER & Co., Bankrupts.

50

An order to show cause, dated the 11th day of April, 1923, why an order should not be made authorizing, empowering and directing the Receiver herein to deliver to the Trustee of the above named bankrupts all of the books of account, papers and other documents of every kind whatsoever in the possession of the Receiver, having been made herein and said order duly coming on to be heard,

Now, on reading and filing the said order to show cause and the petition of George C. Sprague, Trustee herein, duly verified the 13th day of April, 1923, with the exhibits annexed thereto in support of said application, and the petition of Edward M. Fuller and William F. McGee, verified the 18th day of April, 1923, in opposition thereto, and after hearing Carl J. Austrian, of counsel for the Trustee, in support of the application, and William M. Chadbourne, of counsel for creditors,

51

Exhibit D—Order.

52 in support thereof, and William Abramson, of counsel for the bankrupts, in opposition thereto, and

ON MOTION of Francis L. Kohlman, Carl J. Austrian, attorneys for the Trustee, it is

ORDERED, ADJUDGED AND DECREED, that Samuel Strasbourger, Receiver of the above named bankrupts, be and he hereby is authorized, empowered and directed to deliver to the Trustee of the above named bankrupts all of the books of account, papers and other documents of every kind whatsoever of the bankrupts in his possession as such Receiver.

53

Dated, New York, April 19th, 1923.

HAROLD P. COFFIN,
Referee in Bankruptcy.

51

EXHIBIT E.

55

Petition for Review.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

EDWARD M. FULLER and WILLIAM F. McGEE, individually and as co-partners, doing business as E. M. FULLER & Co., Bankrupts.

56

To the Hon. Harold P. Coffin, Referee in Bankruptcy:

The petition of Edward M. Fuller and William F. McGee respectfully shows:

That heretofore and on or about the 26th day of June, 1922, a petition in involuntary bankruptcy was filed against your petitioners in the above entitled proceeding.

Thereafter such proceedings were duly had that your petitioners were adjudicated bankrupts and George C. Sprague, Esq., was elected trustee.

57

That in the course of these proceedings, on the 19th day of April, 1923, an order was made by Hon. Harold P. Coffin, referee in bankruptcy, and entered herein directing Samuel Strasbourger, Esq., to deliver all of the books of account, records and documents in his possession belonging to your petitioners and to the firm of E. M. Fuller & Co. to George C. Sprague, Esq., trustee herein.

Exhibit E—Petition for Review.

58 That such order was and is erroneous in that:

(1) Your petitioners having submitted their petition claiming that their books, records and documents aforesaid contain entries which might tend to degrade and incriminate them, the order of the referee herein should have provided that the trustee should use the books for the civil administration of the bankruptcy estate only and for no other purpose.

(2) The order should have provided that the said books and records of E. M. Fuller & Co. should not be used in any criminal proceeding or criminal investigation
59 directed against your petitioners.

(3) The order should have provided that the trustee be directed not to permit the said books and records to be inspected by any District Attorney, state or federal, or the agents of any District Attorney, and from permitting any District Attorney, state or federal, or any of their agents, or any Grand or Petit Jury, state or federal, from making any copy or excerpts or giving any information which is or may be derived from said records.

(4) That your petitioners having made timely objection to the unqualified and unrestricted delivery of the
60 books to the trustee on the ground that the said books and records contain entries which might tend to incriminate and degrade them and subject them to criminal prosecution and said petitioners having asserted the constitutional protection guaranteed to them by the Fourth and Fifth Amendments to the Constitution of the United States, the order was erroneous in that it denied to your petitioners the guarantees provided in the Fourth and Fifth Amendments to the Constitution of the United States.

(5) The order was further erroneous in that it failed 61
to provide that the said books, records and documents of your petitioners and of E. M. Fuller & Co. be first delivered to the referee for the purpose of ascertaining whether such books, records and documents contain entries which might tend to incriminate your petitioners.

(6) That the referee herein was without jurisdiction in the making of said order and that said proceeding was irregular in that your petitioners herein were not personally served with the order to show cause herein dated April 14, 1923.

(7) That the referee was without jurisdiction in the 62
making of said order in that an order was heretofore made by Hon. Augustus N. Hand, District Judge, dated August 7, 1922, among other things directing the said Samuel Strasbourger to keep and use the books, records and papers of E. M. Fuller & Co. only for the purpose of the civil administration of the bankruptcy estate in accordance with the terms of the stipulation entered into between the attorneys for the bankrupts and the said Samuel Strasbourger and for no other purpose whatsoever and that an application should have been made for an order vacating or modifying the aforementioned order of Hon. Augustus N. Hand.

63
WHEREFORE, your petitioners, feeling aggrieved because of such order, pray that the same be reviewed as provided in the Bankruptcy Act of 1898 and General Order XXVII.

Dated, New York, April 19th, 1923.

EDWARD M. FULLER,
WILLIAM F. McGEE,
Petitioners.

Exhibit E—Petition for Review.

64 State of New York,
County of New York—ss.:

EDWARD M. FULLER and WILLIAM F. McGEE, being severally duly sworn, do depose and say that they are the petitioners herein and are members of the firm of E. M. Fuller & Co.; that they have read the foregoing petition and know the contents thereof and that the same is true to their own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters they believe it to be true.

EDWARD M. FULLER.
65 WILLIAM F. McGEE.

Sworn to before me this
19th day of April, 1923.

WM. ABRAMSON,
Notary Public,
N. Y. Co. No. 17.

66

EXHIBIT F.

67

Exceptions to Referee's Order.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

EDWARD M. FULLER and WILLIAM F. McGEE, individually and as co-partners, doing business as E. M. FULLER & Co., Bankrupts.

68

Now, come Edward M. Fuller and William F. McGee, the above named bankrupts, and file the following exceptions to the order made on the 19th day of April, 1923, by Hon. Harold P. Coffin, referee in bankruptcy, in charge of this proceeding:

(1) Your petitioners having submitted their petition claiming that their books, records and documents aforesaid contain entries which might tend to degrade and incriminate them, the order of the referee herein should have provided that the trustee should use the books for the civil administration of the bankruptcy estate only and for no other purpose.

69

(2) The order should have provided that the said books and records of E. M. Fuller & Co. should not be used in any criminal proceeding or criminal investigation directed against your petitioners.

(3) The order should have provided that the trustee be directed not to permit the said books and records

Exhibit F—Exceptions to Referee's Order.

70 to be inspected by any District Attorney, state or federal, or the agents of any District Attorney, and from permitting any District Attorney, state or federal, or any of their agents, or any Grand or Petit Jury, state or federal, from making any copy or excerpt or giving any information which is or may be derived from said records.

(4) That your petitioners having made timely objection to the unqualified and unrestricted delivery of the books to the trustee on the ground that the said books and records contain entries which might tend to incriminate and degrade them and subject them to criminal
71 prosecution and said petitioners having asserted the constitutional protection guaranteed to them by the Fourth and Fifth Amendments to the Constitution of the United States, the order was erroneous in that it denied to your petitioners the guarantees provided in the Fourth and Fifth Amendments to the Constitution of the United States.

(5) The order was further erroneous in that it failed to provide that the said books, records and documents of your petitioners and of E. M. Fuller & Co. be first delivered to the referee for the purpose of ascertaining whether such books, records and documents contain en-
72 tries which might tend to incriminate your petitioners.

(6) That the referee herein was without jurisdiction in the making of said order and that said proceeding was irregular in that your petitioners herein were not personally served with the order to show cause herein dated April 14, 1923.

(7) That the referee was without jurisdiction in the making of said order in that an order was heretofore made by Hon. Augustus N. Hand, District Judge, dated

August 7, 1922, among other things, directing the said 73
Samuel Strasbourger to keep and use the books, records and papers of E. M. Fuller & Co. only for the purpose of the civil administration of the bankruptcy estate in accordance with the terms of the stipulation entered into between the attorneys for the bankrupts and the said Samuel Strasbourger and for no other purpose whatsoever and that an application should have been made for an order vacating or modifying the aforementioned order of Hon. Augustus N. Hand.

Dated New York, April 19th, 1923.

EDWARD M. FULLER,
WILLIAM F. McGEE, 74
Petitioners.

State of New York,
County of New York—ss.:

EDWARD M. FULLER and WILLIAM F. McGEE, being severally duly sworn, do depose and say, that they are the petitioners herein and are members of the firm of E. M. Fuller & Co.; that they have read the foregoing petition and know the contents thereof and that the same is true to their own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, they believe it to be true. 75

EDWARD M. FULLER.
WILLIAM F. McGEE.

Sworn to before me this
19th day of April, 1923.

WM. ABRAMSON,
Notary Public,
N. Y. Co. No. 14

EXHIBIT G.

76

Order.

At a stated Term of the United States District Court for the Southern District of New York, held at the Post Office Building, in the Borough of Manhattan, City of New York, this 20th day of April, 1923.

Present:—Hon. Julian W. Mack, *Circuit Judge*.

In the Matter

77 of

Edward M. Fuller and William F. McGee, individually and as co-partners, doing business as E. M. Fuller & Co., Bankrupts.

A motion having been made on behalf of George C. Sprague, Esq., Trustee in Bankruptcy herein, for an order dismissing the petition of Edward M. Fuller and William F. McGee, dated April 19, 1923, to review the order of Harold P. Coffin, Esq., Referee in Bankruptcy herein, directing Samuel Strasbourger, Esq., Receiver
78 herein, to deliver the books of account, records and documents of every kind, nature and description belonging to and in the possession of the bankrupts to George C. Sprague, Esq., Trustee in Bankruptcy herein.

Now, upon reading and filing the order to show cause signed by Harold P. Coffin, Esq., Referee in Bankruptcy herein, dated April 16, 1923, and the petition of George C. Sprague, and the exhibits thereto annexed,

Exhibit G—Order.

upon which the said order to show cause was granted, 79
the petition of Edward M. Fuller and William F. McGee, duly verified the 18th day of April, 1923, in which said petition the said Edward M. Fuller and William F. McGee protested against the delivery of said books of account, records and documents to said Trustee, and it appearing in said petition that the said Edward M. Fuller and William F. McGee claim that the delivery of said books of account, records and documents to said Trustee was a violation of the constitutional rights of said Edward M. Fuller and William F. McGee in that the said books of account, records and documents contain entries and information which may tend to incrim- 80
inate and degrade the said Edward M. Fuller and William F. McGee, the order of Harold P. Coffin, Esq., Referee in Bankruptcy herein, dated the 19th day of April, 1923, directing the delivery of the books of account, records and documents of the bankrupts to the Trustee herein, the petition of Edward M. Fuller and William F. McGee, verified the 19th day of April, 1923, praying for a review of the Referee's said order dated April 19, 1923, the exceptions to the said Referee's order dated April 19, 1923, the petition of Edward M. Fuller and William F. McGee, verified the 19th day of April, 1923, praying for a stay of the Referee's said order, and the order to show cause signed by Honorable Julian W. 81
Mack, Circuit Judge, dated April 19, 1923, granting a stay of all proceedings under the Referee's said order, and the record of the proceedings before the Referee herein on the return of the order to show cause dated April 16, 1923, hereinbefore referred to:

And, after hearing Hays, St. John & Moore (Arthur Garfield Hays and William Abramson, of counsel) in support of said motion, and Francis L. Kohlman, Carl

Exhibit G—Order.

82 J. Austrian and William M. Chadbourne, attorneys for the Trustee, in opposition thereto, and upon filing the opinion of the Court;

Now, on motion of Francis L. Kohlman and Carl J. Austrian, attorneys for the Trustee, it is hereby

ORDERED that said motion of George C. Sprague, Esq., Trustee herein, be and the same hereby is granted, and the order of Harold P. Coffin, Esq., Referee herein, dated the 19th day of April, 1923, be confirmed; and it is further

83 ORDERED that said petition to review, filed herein on the 19th day of April, 1923, be and the same hereby is dismissed; and it is further

ORDERED that the application made before me for a stay of this order pending an appeal by the aforementioned Edward M. Fuller and William F. McGee to the Supreme Court of the United States be and the same hereby is denied; and it is further

ORDERED that the stay heretofore granted by me by order made by me dated the 19th day of April, 1923, be
84 and the same hereby is vacated.

JULIAN W. MACK,
United States Circuit Judge.

EXHIBIT H.

85

Memorandum Opinion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

EDWARD M. FULLER and WILLIAM F. McGEE, individually and as co-partners, doing business as E. M. FULLER & Co., Bankrupts. 86

FRANCIS L. KOHLMAN, CARL J. AUSTRIAN, for the Trustee.

CHADBOURNE, HUNT & JAECKEL, by WILLIAM M. CHADBOURNE, C. F. SMYTHE, for General Creditors' Committee.

HAYS, ST. JOHN & MOORE, by ARTHUR GARFIELD HAYS, WILLIAM ABRAMSON, for Bankrupt.

MACK, Circuit Judge:

I am entirely clear that the intimations of the Harris 87
case, although not the express decision, are against any right of the bankrupt to have any limitation placed upon the possession or use of his books by the trustee, and I feel it to be my clear duty to follow these intimations rather than earlier decisions in the lower Court. I may be influenced in this by my own clear conviction, a conviction of many years' standing, that there is no constitutional right under the Fourth and Fifth Amend-

88 ments to possession of property containing incriminating matter where there no longer is title in the person having possession. It seems to me that anybody who places incriminating statements on property which does not belong to him cannot resist the right of the owner of that property to reobtain it, and I know of no method by which he can, as a condition to yielding up the wrongful possession, insist upon the erasure of any incriminating statements or upon some protection against their subsequent use against him. And similarly, a man who puts incriminating statements on his own property, whether it be books or any other kind of chattels,
89 does so with the knowledge that the title to that property may, by process of law, be taken from him; that following the loss of the title, there necessarily will follow the loss and right of possession, and that when that time comes, the retention and possession are as wrongful as if the possession had been originally wrongfully acquired. His situation then is analagous to that of a thief who puts incriminating statements on the stolen property.

Every person is bound to know that under the Bankruptcy Act, should he become bankrupt, title to his books and papers will pass eventually to the trustee. If, with this knowledge, he makes incriminating statements on
90 these papers, the title to which he is chargeable with knowing will pass to the trustee, he does so, in my judgment, at his peril.

But, on broader lines than these, it seems to me that the intimations of the Supreme Court are—and I believe properly are—that the turning over of the possession of these books is not a giving of evidence within the constitutional protection. In the Harris case the bankrupt resisted the limitation placed upon the order requiring

him to deliver possession to the receiver as not broad 91
enough to secure him in all of his constitutional rights; and as the Supreme Court said, if he has the constitutional rights that he claimed, it was not broad enough, because it did not afford him protection against the use of the incriminating statements that might be found in his books as a basis for securing other evidence; whereas the constitutional protection of not giving incriminating testimony would protect one from furnishing testimony which would be the basis of further evidence that might be incriminating.

I am of the opinion, therefore, that the ruling of the Referee was right: the petition to revise must be dis- 92
missed.

Application is made to me for a stay of this order so as to furnish opportunity for appeal. If the result of my order would be to do irreparable damage pending the appeal, I should grant the stay, because in my judgment it is highly desirable that the specific question here raised be taken as promptly as possible for final determination by the Supreme Court. But I cannot see that irreparable damage is done. In the Harris case the Supreme Court refused protection against the use of the books as a basis for obtaining further information. At the present time that is the only use that could be said to damage the bankrupt, and I feel bound by the ruling 93
of the Supreme Court so far as that use is concerned. As to the use of the books themselves as evidence in any criminal proceedings, whether before the Grand Jury or on the trial, if such use under the Constitution is violative of their constitutional rights, the defendants will be able, by proper objection, eventually to secure all of the protection that they are justly entitled to in this respect. If it is not a violation of their consti-

94 tutional rights, then they cannot be damaged by it, and it is highly important, in the interest of justice, that the opportunity should be given to the State authorities, at their risk as to a subsequent overruling of their views as to the propriety of this use, that the use itself be permitted.

Therefore the motion for a stay is denied.

April 19, 1923.

JULIAN W. MACK,
U. S. Circuit Judge.

95

96

EXHIBIT I.

97

Order.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Bankruptcy—No. 32572.

In the Matter

of

EDWARD M. FULLER and WILLIAM F. McGEE, individually and as co-partners doing business as E. M. Fuller & Co.,

98

Bankrupts.

On reading and filing the petition of George C. Sprague, Trustee of the above-named bankrupts, duly verified the 20th day of April, 1923, annexed hereto, and the affidavits of Arthur Garfield Hays, Sidney L. Struble, and William J. Fallon, each verified the 24th day of April, 1923, and the stipulation filed herein dated June 27th, 1923, and the order of Hon. Augustus N. Hand, as Judge of this Court, entered on August 7th, 1922, and after hearing Francis L. Kohlman, Carl J. Austrian, attorneys for the Trustee, and William M. Chadbourne, counsel to the Committee of General Creditors, and Hugo Wintner and John Caldwell Myers, Assistant District Attorneys, in support of said motion, and William J. Fallon and Arthur Garfield Hays, of counsel for the bankrupts in opposition thereto,

99

Now, on motion of Francis L. Kohlman, Carl J. Austrian, it is

Exhibit I—Order.

100 ORDERED, ADJUDGED AND DECREED, that Messrs. Hays, St. John & Moore, attorneys for the above-named bankrupts, and Messrs. Fallon & McGee, attorneys for Edward M. Fuller and William F. McGee in criminal proceedings now pending and Edward M. Fuller and William F. McGee, be and they hereby are severally directed to turn over, deliver and surrender to the Trustee forthwith all such books, papers, records, and other documents of the bankrupts enumerated in the receipts annexed to the said petition as they severally had in their possession or control at time of service of notice of the application for this order, namely: said Hays, St. John &
101 Moore on April 20, 1923, said Fallon & McGee on April 23, 1923, and said Fuller & McGee on April 20, 1923, at time of service of notice on said Hays, St. John & Moore, their attorneys.

April 24th, 1923.

JULIAN W. MACK,
Circuit Judge.

102

EXHIBIT J.

103

Re: E. M. FULLER & CO., BANKRUPTS.

Hearing before Judge Mack—April 24, 1923.

Mr. Hays: I said I was convinced that irreparable damage would be done if we did not have a stay.

Judge Mack: I say that proposition was not argued; I did say that I could not see how any irreparable injury could be done, because I said that you would be able to reserve your rights on any rulings as to the use of his testimony and would thereby eventually get to the Supreme Court. I am not at all sure that was sound because I was thinking that the prosecution was in the 104
Federal Court, and if prosecution had been in the Federal Court, it would be sound. The prosecution, however, is in the State Court, and as between the Federal Court and the State Court there is a reciprocal disregard, because the Federal Court does exactly the same thing. The Supreme Court of the United States says that if stolen property gets into the hands of a prosecutor properly, he can use it, but if it is taken without a search warrant by a Federal officer, he cannot use it; and now if the Federal Courts get hold of evidence taken by a State officer without a State warrant, under the Supreme Court decision that evidence can be used, 105
whereas if it is taken by a Federal officer under pretended authority of Federal law, it could not be used. If in this case these books are delivered to the trustee and the trustee is then subpoenaed in the State Court, the State Court gets that evidence whether the trustee's holding is valid or not. Whether my order directing that it be delivered to him without reservation of any rights is valid or not, the State Court can use them and there can be no Federal question involved under the Fourth

and Fifth Amendments as to any use of them. There is
106 no violation of the rights under these amendments by the State Court because they are binding only on the Federal authorities, and in so far as similar provisions in the State Constitution are concerned, I assume that under the Adams case or without the Adams case the use of evidence of this kind obtained by the State authorities, as this would be obtained, would not be deemed as contravening the State Constitution. I am not deciding this now but am thinking aloud to let you see what is in my mind and to let you see what there is for you now to answer so that early application may be made to the Supreme Court, and the Supreme Court can then determine what should be done.

107 Mr. Fallon has said, Mr. Chadbourne, that Justice Brandeis' attention, like mine, was not called to the exact point that this prosecution is in the State Court and that the State Court, if it can get this evidence, will be free from reversal on writ or error from the Supreme Court of the United States because of the use of this evidence.

In the sense of knowing it, I knew it too, but it was not present in my mind as a fact, with the legal deduction from that fact, at the time that I spoke. If you had asked me where it was pending I would have said at once before Judge Nott in the State Court; but I did not have it in my mind as affecting my reasoning—that is
108 all I mean.

Mr. Chadbourne: Now it seems to me that really the question which your Honor asked has been disposed of in your Honor's opinion and is clearly disposed of in these two Supreme Court cases, namely, that the Constitution of the United States does not say that a man who commits a crime and then becomes bankrupt can refuse to turn his papers over to the Trustee in bankruptcy on grounds that they may be used against him.

Judge Mack: You are now arguing a question that I

have decided. I have decided that that is no protection. I have decided that even though it is exactly as if the books were in the hands of Fuller and McGee, an order will be entered that they turn them over to the Trustee. If I do not grant a stay and if they comply with it under the orders of this Court, they may suffer irreparable injury in the use of the evidence in the State Court, if in the use of it in the State Court they cannot be protected on writ of error from the Supreme Court. 109

Mr. Chadbourne: Your Honor is contemplating that the Supreme Court may disagree with your Honor in your Honor's view that the turning over of these books to the Trustee does not constitute giving of evidence. Now it seems to me that it is quite clear that if the turning over of those books to the Trustee constitutes giving of evidence, when those books are subpoenaed and put in evidence, if they are in this trial in the State Court, and that an objection then made to the introduction, if that objection be overruled, can come up on writ of error to the United States Supreme Court. Now let us suppose, to take an analogous case, these defendants are called to the stand by the District Attorney and he seeks to question them. Their counsel objects on the ground that compelling them to be witnesses against themselves violates their rights. Suppose the Judge rules against them on it. He says that does not constitute a violation of their rights guaranteed them by the Constitution of the United States. It seems to me quite clear that on writ of error that question would go to the Supreme Court. 110 111

Judge Mack: I should be quite clear that they would dismiss that writ of error as frivolous.

Mr. Chadbourne: If that be the case, no Constitutional right of these defendants has been violated.

Judge Mack: I quite agree that no Federal Constitutional right will have been violated if the State of New

York uses the evidence which they may obtain in that way; but if the defendants ought not to be compelled
112 to give us these books to their Trustee—in other words, if I am wrong in my decision, which is in your favor, if the Supreme Court differs with me, then by reason of my decision the defendants will have lost, and irreparably have lost, rights which they otherwise would not have lost, because I would have put it in the power of the State to subpoena the trustee, who will have the books now, to use as evidence against these defendants, documents which the State could not have gotten but for the exercise of this power by me. The defendants themselves cannot be compelled, under the State Constitution, to go on the stand and produce their books. They have
113 a right, under the State Constitution, not to give that evidence against themselves. They have no such right as to books held by the trustee in bankruptcy; and as there would be no violation therein of the rights guaranteed them under the United States Constitution, it follows that if I am wrong on the merits of this case—if the Supreme Court is of opinion that I ought never to have entered the order compelling them to give up books to the trustee—they will have suffered irreparable damage. That is Mr. Fallon's argument, and I think it is sound.

If the Supreme Court had once in any case clearly decided the question which I am called upon to decide
114 here, there would not be any question of State rights; but in my judgment, whatever intimations they have given,—and I think they have given clear intimations,—they have not decided this question. It is an extremely important question of Constitutional rights. It is one which never will be satisfactorily dealt with until the Supreme Court decides it. I might not be perhaps nearly as seriously concerned about the question of the correctness or wrongness of my decision if it involved

only the protection of some bankrupts in having their books used against themselves. It is because of the importance of this matter in its bearings in other situations as well as because of its effect upon these immediate parties, that it ought to be settled, must be settled, can be settled only by the Supreme Court. Now, I am satisfied, unless you can present something more, that I spoke too hastily the other day in saying that there could not be irreparable damage. I then refused a stay because, as I saw it then, there could not be any irreparable damage. In my judgment, I overlooked the fact that this was a State Court proceeding and the use of these books therein would not be ground for reversal as violating the defendants' rights under the Fourth and Fifth Amendments. 115 116

Mr. Myer: I think we are all agreed that no agency of the State, whether it be executive, legislative, or judicial, may deprive or has power to deprive anyone of any rights guaranteed to him by the Constitution of the United States.

Judge Mack: The specific rights here involved are not rights which, by the Federal Constitution are guaranteed to him as against the State of New York, but only as against Federal action.

He is saying that to take these books away from him is compelling him indirectly to give evidence against himself, and the Federal Constitution protects him against that so far as the Federal Government is concerned, and it is the power of the Federal Government that is now being exercised. 117

The State Court could not ask the Federal Government to furnish it aid in a way which would violate defendant's Federal Constitutional rights, and that is what you in effect are asking. In so far as the State of New York is coming here to ask me to deprive a man of his rights under the Federal Constitution, of course the Federal Court would not aid in that respect.

Now, in my judgment, they have no such rights as they claim; therefore the Federal Court will aid. But the
118 immediate question before me is, should I enforce my orders now, thereby, so far as these particular defendants are concerned, putting them into an irreparably bad condition, when it may be that the Supreme Court will overturn my decision, holding that I erred therein.

Mr. Meyer: It may be the way my mind works, but I cannot see that when a bankrupt comes into this Court and invokes protection of the Fourth and Fifth Amendments,—I cannot see that he makes out a case.

Judge Mack: So far as this proceeding is concerned in bankruptcy, he says I haven't any right to take away from him what may be incriminating matter. He does
119 not base this entirely upon the fact that there is an indictment pending against him in the Court of New York State. His claim is I cannot take documents from him that may contain incriminating evidence against him. That is the question he wants the Supreme Court to pass on. I say he is wrong, that I can take it. He says only the Supreme Court can decide it. Now, if I am wrong, I will have done him irreparable injury.

120

Supreme Court of the United States

In the Matter
of
EDWARD M. FULLER and WILLIAM F. McGEE, individually and as co-partners, doing business as E. M. Fuller & Co.,

Bankrupts.

DISTRICT COURT DOCKET No. 32578.

ON HEARING ON APPLICATION OF BANKRUPTS FOR A STAY OF ORDERS OF JUDGE MACK DATED APRIL 20 AND APRIL 24, 1923.

3

MEMORANDUM ON BEHALF OF CREDITORS' COMMITTEE IN OPPOSITION TO APPLICATION FOR STAY.

CHADBOURNE, HUNT & JAECKEL,
Attorneys for Creditors' Committee of E. M. Fuller & Company,
No. 165 Broadway,
New York City.

WILLIAM M. CHADBOURNE,
CYRUS F. SMYTHE,
C. R. WARD,
of Counsel.

Dated April 27, 1923.

The Hecla Press, 57 Warren St., N. Y. Tel. Barclay 6580.

Supreme Court of the United States

In the Matter

of

Edward M. Fuller and William F. McGee, individually and as co-partners, doing business as E. M. Fuller & Co.,

Bankrupts.

District Court Docket No. 32578.

On Hearing on Application of Bankrupts for a Stay of Orders of Judge Mack dated April 20 and April 24, 1923.

MEMORANDUM ON BEHALF OF CREDITORS' COMMITTEE IN OPPOSITION TO APPLICATION FOR STAY.

Statement.

In order that this Court may have before it in concise form the two orders of Judge Mack dated April 20 and April 24, 1923, and also his order dated April 25, 1923, we have attached these orders to this memorandum as Exhibits A, B and C respectively. The order of Judge Mack, dated April 25, 1923, grants a temporary stay of the two previous orders pending the determination by this

Court on the application of the bankrupts for a stay until this Court shall have disposed of the matter. In short, Judge Mack is maintaining matters in *statu quo* until this Court passes upon the bankrupts' application for a stay. This of course is eminently proper since the propriety of granting a stay will be determined after due effect is given to two decisions of this Court, namely:

Matter of Harris, 221 U. S. 274.
Johnson v. *United States*, 228 U. S. 457.

The Facts.

These bankrupts were stock brokers. Thirteen indictments, returned against them by the Grand Jury of New York County, charge them with having operated a bucket shop. They failed, owing about $1,800,000 to more than 3,000 creditors, and the assets so far discovered total only about $90,000. Testimony brought out by the Creditors' Committee before the Referee in Bankruptcy shows that some $6,612,000 worth of securities which should have been in the possession of the bankrupts, or under their control, have disappeared.

POINT I.

The granting of the stay asked for will seriously prejudice the creditors of the bankrupts.

The efforts of the Creditors' Committee to locate the missing assets of the estate have been seriously prejudiced by the refusal of the bankrupts to permit the counsel for the Creditors' Committee to have access to the books. Annexed to this memorandum as Exhibits E and F is correspondence showing such refusal. For this reason it is of the utmost importance that the right, guaranteed to the creditors by Section 70 of the Bankruptcy Law, to secure, through the election of a trustee, unqualified possession of the property, including the books and papers of the bankrupts, be made effective at once. The granting of a stay will hold up the creditors for several months at least. While counsel for the bankrupts have, since the election of the trustee and the commencement of the attempts to secure possession of the books, indicated that upon certain terms they might permit the creditors to inspect the books, such concession by grace is altogether unacceptable to the creditors. The creditors are clearly entitled to have the books forthwith placed in the custody of the trustee.

POINT II.

Judge Mack's orders are based upon unquestionably sound law and no stay should therefore be granted.

Judge Mack's decision (opinion annexed hereto as Exhibit D) and orders follow squarely two decisions of this Court, the opinions of which are written by Mr. Justice Holmes. These cases are *Matter of Harris* (*supra*) and *Johnson v. United States* (*supra*). These cases squarely hold that the delivery of the bankrupts' books to the trustee (even though followed by their use against the bankrupts in a criminal proceeding) is not a giving of testimony by the bankrupt within the meaning of the Fifth Amendment of the Constitution of the United States. The *Harris* case decides that the trustee has the unqualified right to the books; the *Johnson* case holds that, after the books are in the possession of the trustee, they may be admitted in evidence as having been produced by a third party into whose hands they came *alio intuitu*. Mr. Justice Holmes in the *Johnson* case with admirable clearness states the matter as follows (p. 458):

> "It is true that the transfer of the books may have been against the defendant's will, but it is compelled by the law as a necessary incident to the distribution of his property, not in order to obtain criminal evidence against him. Of course a man cannot protect his property from being used to pay his debts by attaching to it a disclosure of crime. If the documentary confession comes to a third hand *alio intuitu*, as this did, the use of it in court does not compel the defendant to be a witness against himself."

No new question is raised in the instant case; and there is no reason for staying Judge Mack's order.

POINT III.

The Federal Court should not concern itself with the contention that irreparable injury will be done to the bankrupts by the State Court in the pending criminal proceedings.

We understand that counsel for the bankrupts will urge that irreparable injury will, unless the orders of Judge Mack be stayed, be done to the bankrupts, through the admission of the books in evidence against them in the pending criminal proceedings. This might be true if this Court had not already squarely held that the bankrupts have no constitutional rights which entitle them to withhold the surrender of the books to the trustee. This Mr. Justice Holmes squarely decides in *Matter of Harris* when he says (p. 279):

> "If the order to the bankrupt, standing alone, infringed his constitutional rights, it might be true that the provisions intended to save them would be inadequate and that nothing short of statutory immunity would suffice. But no constitutional rights are touched. The question is not of testimony but of surrender—not of compelling the bankrupt to be a witness against himself in a criminal case, present or future, but of compelling him to yield possession of property that he no longer is entitled to keep. If a trustee had been appointed, the title to the books would have vested in him by the

express terms of Sec. 70, and the bankrupt could not have withheld possession of what he no longer owned, on the ground that otherwise he might be punished. That is one of the misfortunes of bankruptcy if it follows crime. The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story."

POINT IV.

The application for a stay should be denied.

For the reasons already set forth we respectfully urge that the application for a stay be given priority of consideration by this Court so that, if the application is denied, the trustee may assume at the earliest possible date untrammelled possession of the books and papers in question.

Dated April 27, 1923.

Respectfully submitted,

CHADBOURNE, HUNT & JAECKEL,
Attorneys for Creditors' Committee of
E. M. Fuller & Company,
165 Broadway,
New York City.

WILLIAM M. CHADBOURNE,
CYRUS F. SMYTHE,
C. R. WARD,
of Counsel.

Exhibit A.

At a Stated Term of the United States District Court for the Southern District of New York, held at the Post Office Building, in the Borough of Manhattan, City of New York, this 20th day of April, 1923.

Present:

Hon. JULIAN W. MACK,
Circuit Judge.

IN THE MATTER OF EDWARD M. FULLER and WILLIAM F. McGEE, individually and as co-partners doing business as E. M. FULLER & Co., Bankrupts.	No. 32578

A motion having been made on behalf of George C. Sprague, Esq., Trustee in Bankruptcy herein, for an order dismissing the petition of Edward M. Fuller and William F. McGee, dated April 19, 1923, to review the order of Harold P. Coffin, Esq., Referee in Bankruptcy herein, directing Samuel Strasbourger, Esq., Receiver herein, to deliver the books of account, records, and documents of every kind, nature and description belonging to and in the possession of the bankrupts to George C. Sprague, Esq., Trustee in Bankruptcy herein,

Now, upon reading and filing the order to show cause signed by Harold P. Coffin, Esq., Referee in Bankruptcy herein, dated April 16, 1923, and the petition of George C. Sprague, and the exhibits thereto annexed, upon which the said order to show cause was granted, the petition of Edward M. Fuller and William F. McGee duly verified the 18th day of April, 1923, in which said petition the said Edward M. Fuller and William F. McGee protested against the delivery of said books of account, records and documents to said Trustee, and it appearing in said petition that the said Edward M. Fuller and William F. McGee claim that the delivery of said books of account, records and documents to said Trustee was a violation of the constitutional rights of said Edward M. Fuller and William F. McGee, in that the said books of account, records and documents contain entries and information which may tend to incriminate and degrade the said Edward M. Fuller and William F. McGee, the order of Harold P. Coffin, Esq., Referee in Bankruptcy herein, dated the 19th day of April, 1923, directing the delivery of the books of account, records and documents of the bankrupts to the Trustee herein, the petition of Edward M. Fuller and William F. McGee verified the 19th day of April, 1923, praying for a review of the Referee's said order dated April 19, 1923, the exceptions to the said Referee's order dated April 19, 1923, the petition of Edward M. Fuller and William F. McGee, verified the 19th day of April, 1923, praying for a stay of the Referee's said order, and the order to show cause signed by Honorable Julian W. Mack, Circuit Judge, dated April 19, 1923, granting a stay of all proceedings under the Referee's said order,

and the record of the proceedings before the Referee herein on the return of the order to show cause dated April 16, 1923, hereinbefore referred to:

And, after hearing Hays, St. John & Moore (Arthur Garfield Hays and William Abramson, of counsel) in support of said motion, and Francis L. Kohlman, Carl J. Austrian and William M. Chadbourne, attorneys for the Trustee, in opposition thereto, and upon filing the opinion of the court:

NOW, on motion of Francis L. Kohlman and Carl J. Austrian, attorneys for the Trustee, it is hereby

ORDERED that said motion of George C. Sprague, Esq., Trustee herein, be and the same hereby is granted, and the order of Harold P. Coffin, Esq., Referee herein, dated the 19th day of April, 1923, be confirmed; and it is further

ORDERED that said petition to review, filed herein on the 19th day of April, 1923, be and the same hereby is dismissed; and it is further

ORDERED that the application made before me for a stay of this order pending an appeal by the aforementioned Edward M. Fuller and William F. McGee to the Supreme Court of the United States, be and the same hereby is denied; and it is further

ORDERED that the stay heretofore granted by me herein by order made by me on the 19th day of April, 1923, be and the same hereby is vacated.

JULIAN W. MACK,
United States Circuit Judge.

Exhibit B.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF EDWARD M. FULLER and WILLIAM F. McGEE, individually and as co-partners doing business as E. M. FULLER & Co., Bankrupts.	In Bankruptcy N. 32578

On reading and filing the petition of George C. Sprague, Trustee of the above-named Bankrupts, duly verified the 20th day of April, 1923, annexed hereto, and the affidavits of Arthur Garfield Hays, Sidney L. Struble, and William J. Fallon, each verified the 24th day of April, 1923, and the stipulation filed herein dated June 27th, 1922, and the order of Hon. Augustus N. Hand, as Judge of this Court, entered on August 7th, 1922, and after hearing Francis L. Kohlman, Carl J. Austrian, attorneys for the Trustee, and William M. Chadbourne, counsel to the Committee of General Creditors, and Hugo Wintner and John Caldwell Myers, Assistant District Attorneys, in support of said motion, and William J. Fallon and Arthur Garfield Hays, of counsel for the Bankrupts, in opposition thereto,

Now, on motion of Francis L. Kohlman, Carl J. Austrian, it is

ORDERED, ADJUDGED AND DECREED, that Messrs. Hays, St. John & Moore, attorneys for the above-named Bankrupts, and Messrs. Fallon & McGee, attorneys for Edward M. Fuller and William F. McGee in criminal proceedings now pending, and Edward M. Fuller and William F. McGee, be and they hereby are severally directed to turn over, deliver and surrender to the Trustee forthwith all such books, papers, records, and other documents of the Bankrupts enumerated in the receipts annexed to the said petition as they severally had in their possession or control at time of service of notice of the application for this order, namely: said Hays, St. John & Moore on April 20, 1923, said Fallon & McGee on April 23, 1923, and said Fuller & McGee on April 20, 1923, at time of service of notice on said Hays, St. John & Moore, their attorneys.

April 24th, 1923.

JULIAN W. MACK,
Circuit Judge.

Exhibit C.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF EDWARD M. FULLER and WILLIAM F. McGEE, individually and as co-partners doing business as E. M. FULLER & Co., Bankrupts.	In Bankruptcy No. 32578

Orders having been made by this Court in this matter on the 20th and 24th days of April, 1923, respectively and William J. Fallon, of Counsel for the bankrupts, having stated to the Court that he intends to appeal from and/or to apply forthwith to the Supreme Court of the United States for writs of error and/or certiorari in respect of said orders and for a stay of said orders pending the decision upon said writs of error and/or certiorari and/or appeal, and after hearing William J. Fallon and Arthur Garfield Hays, of Counsel for the bankrupts, in support of an application for a stay by this Court of the said orders, and after hearing Francis L. Kohlman and Carl J. Austrian, attorneys for the Trustee, William M. Chadbourne, Counsel for the Committee of General Creditors, and Hugo Wintner and John Caldwell Myers, As-

sistant District Attorneys of New York County, in opposition thereto,

Now, on motion of William J. Fallon and Arthur Garfield Hays, of Counsel for the Bankrupts, it is

ORDERED, ADJUDGED AND DECREED

(1) That the said orders made on the 20th and 24th days of April, 1923, be and they hereby are stayed until the action by the Supreme Court of the United States upon the application for said stay to be made by the bankrupts to the Supreme Court of the United States or until further order of this Court.

(2) That this stay is granted upon condition that the said bankrupts apply to the Supreme Court of the United States for said stay on or before April 27th, 1923.

Dated, April 25, 1923.

J. W. MACK,
United States Circuit Judge.

Exhibit D.

Opinion of Judge Mack.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Matter of EDWARD M. FULLER and WILLIAM F. McGEE, individually and as co-partners doing business as E. M. FULLER & Co., bankrupts.

Petition to review order of referee directing receiver to turn over all the books of account, memoranda and other property to the trustee.

Francis L. Kohlman and Carl J. Austrian for trustee; Chadbourne, Hunt & Jaeckel (William M. Chadbourne and C. F. Smythe of counsel) for General Creditors' Committee; Hays, St. John & Moore (Arthur Garfield Hays and William Abramson of counsel) for bankrupts.

MACK, Circuit Judge—I am entirely clear that the intimations of the Harris case, although not the express decision, are against any right of the bankrupt to have any limitation placed upon the possession or use of his books by the trustee, and I feel it to be my clear duty to follow these intimations rather than earlier decisions in the lower court. I may be influenced in this by my own clear conviction, a conviction of many years' standing, that there is no constitutional right under the Fourth and Fifth Amendments to possession of property containing incriminating matter where there no longer is title in the person hav-

ing possession. It seems to me that anybody who places incriminating statements on property which does not belong to him cannot resist the right of the owner of that property to reobtain it, and I know of no method by which he can, as a condition to yielding up the wrongful possession, insist upon the erasure of any incriminating statements or upon some protection against their subsequent use against him. And similarly, a man who puts incriminating statements on his own property, whether it be books or any other kind of chattels, does so with the knowledge that the title to that property may, by process of law, be taken from him; that following the loss of the title, there necessarily will follow the loss and the right of possession, and that when that time comes the retention and possession are as wrongful as if the possession had been originally wrongfully acquired. His situation then is analogous to that of a thief who puts incriminating statements on the stolen property.

Every person is bound to know that under the Bankruptcy Act, should he become bankrupt, title to his books and papers will pass eventually to the trustee. If, with this knowledge, he makes incriminating statements on these papers, the title to which he is chargeable with knowing will pass to the trustee, he does so, in my judgment, at his peril.

But on broader lines than these it seems to me that the intimations of the Supreme Court are—and I believe properly are—that the turning over of the possession of these books is not a giving of evidence within the constitutional protection. In

the Harris case the bankrupt resisted the limitation placed upon the order requiring him to deliver possession to the receiver as not broad enough to secure him in all of his constitutional rights; and as the Supreme Court said, if he had the constitutional rights that he claimed it was not broad enough, because it did not afford him protection against the use of the incriminating statements that might be found in his books as a basis for securing other evidence, whereas the constitutional protection of not giving incriminating testimony would protect one from furnishing testimony which would be the basis of further evidence that might be incriminating.

I am of the opinion, therefore, that the ruling of the referee was right; the petition to revise must be dismissed.

Application is made to me for a stay of this order so as to furnish opportunity for appeal. If the result of my order would be to do irreparable damage pending the appeal I should grant the stay, because in my judgment it is highly desirable that the specific question here raised be taken as promptly as possible for final determination by the Supreme Court. But I cannot see that irreparable damage is done. In the Harris case the Supreme Court refused protection against the use of the books as a basis for obtaining further information. At the present time that is the only use that could be said to damage the bankrupt, and I feel bound by the ruling of the Supreme Court so far as that use is concerned. As to the use of the books themselves as evidence in any criminal proceedings, whether before the grand jury or on the trial, if such use under the constitution is vio-

lative of their constitutional rights the defendants will be able, by proper objection, eventually to secure all of the protection that they are justly entitled to in this respect. If it is not a violation of their constitutional rights, then they cannot be damaged by it, and it is highly important, in the interest of justice, that the opportunity should be given to the state authorities, at their risk as to a subsequent overruling of their views as to the propriety of this use, that the use itself be permitted.

Therefore the motion for a stay is denied.

Exhibit E.

(Copy)

CHADBOURNE, HUNT & JAECKEL
165 Broadway

New York, March 26, 1923.

E. M. Fuller & Co.

Dear Sirs:

Will you kindly furnish us with a letter directed to the accountants for the receiver, Leslie, Banks & Company, requesting them to allow us to examine certain portions of the books of the bankrupt firm? We have had this matter up with them, and they say that they will be glad to show us the parts of the books which will be of use to us in assisting in the examination of the bankrupt, provided they get your permission.

We shall appreciate your sending us this letter immediately, in order that we may prepare for the first meeting of creditors which is to take place next Saturday.

Very truly yours,

CHADBOURNE, HUNT & JAECKEL.

Francis L. Kohlman, Esq.,
Carl J. Austrian, Esq.,
27 Cedar Street,
New York City.

Exhibit F.

(Copy)

HAYS, ST. JOHN & MOORE

March 28, 1923.

Francis L. Kohlman and
Carl J. Austrian, Esqs.,
27 Cedar Street, City.

Re: E. M. Fuller & Co.

Dear Sir:

We beg to acknowledge receipt of your favor of the 27th inst., enclosing copy of letter from Chadbourne, Hunt & Jaeckel, dated March 26, 1923, and your reply to said letter.

In view of the pending indictments against the bankrupts we regret that we cannot permit the examination by Chadbourne, Hunt & Jaeckel of the bankrupts' books.

Very truly yours,

HAYS, ST. JOHN & MOORE.

WA P

Supreme Court of the United States,

OCTOBER TERM, 1922.

No. .

IN THE MATTER

of

EDWARD M. FULLER and WILLIAM F. McGEE, individually and as co-partners doing business as E. M. Fuller & Co.,

Bankrupts.

MEMORANDUM
OPPOSING APPLICATION FOR STAY.

JOAB H. BANTON,
District Attorney,
New York County,
as *Amicus Curia.*

JOHN CALDWELL MYERS,
HUGO WINTNER,
Assistant District Attorneys,
Of Counsel.

April 25th, 1923.

Printed in the U. S. by Pandick Press, Inc., 22 Thames Street, New York

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Supreme Court of the United States,

OCTOBER TERM, 1922.

No. .

In the Matter

of

Edward M. Fuller and William F. McGee, individually and as copartners doing business as E. M. Fuller & Co.,

Bankrupts.

MEMORANDUM OPPOSING APPLICATION FOR STAY.

The bankrupts are seeking to obtain a writ of error to review an order entered by Judge Mack, in the District Court of the United States for the Southern District of New York, and are also applying for a stay pending the proceedings in this court on the writ of error. The circumstances leading up to the making and entry of the order in the District Court are set out in a memorandum submitted by the Trustee in Bankruptcy, and, therefore, will not be repeated herein.

The District Attorney of the County of New York is not a party to the proceeding, but the People of the State of New York are vitally interested in the outcome of the proceeding for the reason that it is desired to use certain books, records and documents as evidence in criminal prosecutions now pending in the Court of General Sessions of the Peace in the County of New York wherein the bankrupts, Edward M. Fuller and William F. McGee, are defendants. The books, records and documents in question were used in the course of the business conducted by the bankrupts prior to the bankruptcy and passed into the possession of the receiver in bankruptcy at or about the time of his appointment. The referee in bankruptcy has ordered the receiver to turn over the books, etc., to the trustee.

In view of the facts just stated, the District Attorney respectfully begs leave to submit this memorandum as *amicus curia*.

It is respectfully submitted that the application for a stay pending argument should be denied for the following reasons:

1. *The Fourth and Fifth Amendments to the Federal Constitution have no application to State action.*

It is contended by the bankrupts that if the trustee in bankruptcy is ordered or permitted to deliver their books of account, etc., to the District Attorney of New York County for use as evidence or in procuring evidence in criminal prosecutions pending against them in the courts of the State of New York, such delivery will

constitute a violation of rights and privileges secured to them by the Fourth and Fifth Amendments of the Constitution of the United States.

It seems to us to be clear that there is no merit whatever in this contention. It is settled beyond question that the Fourth and Fifth Amendments are restrictive only of national action (*Twining v. New Jersey*, 211 U. S. 78). This being so, it would seem to follow as a matter of course that the bankrupts cannot invoke the aid of the Federal courts to restrain the state authorities from using the books of account, etc., as evidence against the bankrupts in criminal proceedings pending in the state courts. The bankrupts are not entitled to relief on the theory that there is a threatened violation by the state of the rights and privileges guaranteed by the Fourth and Fifth Amendments, because those amendments afford no protection against action taken by any of the agencies of the state government, and therefore the bankrupts have no rights or privileges which can be violated by the state.

It is an indisputable proposition that a state cannot in any manner or through any of its agencies deprive a person of rights secured to him by the Constitution of the United States.

We take it that it is equally indisputable that the United States courts will not undertake to interfere with the right of the state to institute and prosecute in accordance with the State laws a person charged with having violated the criminal laws of the State, except upon a showing that the action of the State authorities will violate, invade or impair some right or privilege se-

cured to the defendant by the Constitution of the United States. We do not believe that the United States courts will assist persons charged with crime to prevent the State authorities from procuring evidence to be used against the defendants, if the reception of the evidence at the trial in the State court will not constitute a violation of rights secured to the defendants by the Federal Constitution.

2. *The stipulation between the bankrupts and the receiver was ineffectual to preserve any right or privilege which the bankrupts may have had against the use of the books as evidence against them.*

Even if we concede for the purpose of this argument that the bankrupts, prior to the bankruptcy, were protected by the Fifth Amendment against the use of their books as evidence against them in criminal proceedings in the State courts, we submit that the constitutional protection was lost when the books passed into the possession and control of the receiver in bankruptcy. We think that this is so notwithstanding the fact that at the time of the surrender of the books to the receiver a stipulation was made by and between him and the bankrupts to the effect that the books would be used solely for the purpose of the civil administration of the bankrupt estate and would not be used for the purpose of aiding any criminal investigation or prosecution of the bankrupts.

In *Johnson* v. *United States* (228 U. S. 457), it was held that a party is privileged from producing his books in a prosecution against him, but is

not privileged from their production. In that case the books were produced by the trustee in bankruptcy. The only distinctions between the *Johnson* case and the case at bar are that in the former case the prosecution was in a Federal, instead of a state court, and that it did not appear that the bankrupts attempted to preserve or reserve their privilege against the use of the books as evidence against them in a criminal proceeding, when the books were surrendered to the receiver in bankruptcy.

It seems to us to be clear that the stipulation in this case that the books should not be used for the purpose of aiding any criminal investigation or prosecution of the bankrupts was wholly ineffectual to deprive the state authorities of the right to subpoena the books after they passed into the possession and control of the receiver. The bankrupts were required by the Bankruptcy Act to surrender the books to the receiver, and they had no right to impose any condition or make any reservation as to the use which should be made of the books after the surrender. The books ceased to be private papers the very instant they were turned over to the receiver. When the entries were made in the books, the bankrupts were charged with notice of the provisions of the Bankruptcy Act, and they must be deemed to have assumed the risk that at some time in the future they might be thrown into bankruptcy with the resultant effect that the books would pass out of their possession and control and they would lose their right to object to the use of the books as evidence in criminal proceedings against them.

Even if the stipulation with the receiver protected the bankrupts against the use of the books as evidence so long as they remained in the possession and control of the receiver, that protection was lost when the possession and title to the books passed to the trustee, who was not a party to the stipulation and was not bound by it. As Mr. Justice Holmes said in *Matter of Harris* (221 U. S. 274, 279), "that is one of the misfortunes of bankruptcy if it follows crime".

It seems to us that the *Harris* and *Johnson* cases are authority for the proposition that the bankrupts are not entitled to prevent the District Attorney of New York County from obtaining the books of the bankrupts for use as evidence in the criminal proceedings pending against them.

We respectfully express the earnest hope that the Court may find it convenient to render a speedy decision on the application for a stay pending the argument on the writ of error. Our reasons for making this request are these: One of the bankrupts herein, Edward M. Fuller, is now on trial in the Court of General Sessions of the Peace in and for the County of New York. The indictment charges the crimes of maintaining a "bucket shop" and "bucketing" certain stock transactions. The trial commenced on April 19, 1923, and continued until April 23, when it was adjourned for the purpose of permitting the defendant's attorneys to appear before Judge Mack in the District Court of the United States for the Southern District of New York in proceedings concerning the possession of the books. On April 24, 1923, the trial was again adjourned until April

30, 1923, to give the attorneys for the defendant opportunity to apply to this court for an order staying the production of the books.

Respectfully submitted,

JOAB H. BANTON,
District Attorney,
New York County,
as *Amicus Curia.*

JOHN CALDWELL MYERS,
HUGO WINTNER,
Assistant District Attorneys,
Of Counsel.

April 25th, 1923.

Supreme Court of the United States.

In the Matter

—of—

EDWARD M. FULLER and WILLIAM F. McGEE, individually and as co-partners, doing business under the name of E. M. Fuller & Co.,

Bankrupts.

BRIEF OF APPELLANTS.

FALLON & McGEE,
Attorneys for Appellants.

WILLIAM J. FALLON,
EUGENE F. McGEE,
ARTHUR GARFIELD HAYS.
Of Counsel.

THE COURT PRESS—47 West Street—Bowling Green 2830

Supreme Court of the United States.

In the Matter

—of—

EDWARD M. FULLER and WILLIAM F. McGEE, individually and as co-partners, doing business under the name of E. M. FULLER & Co.,

Bankrupts.

BRIEF OF APPELLANTS.

Statement of Procedure.

On June 26th, 1922, a petition in involuntary bankruptcy was filed against Edward M. Fuller and William F. McGee, individually and as co-partners, doing business as E. M. Fuller & Co.

Thereafter, Samuel Stadsbourger, Esq., was duly appointed receiver of the concern, and thereupon demanded that the bankrupt turn over to him the books of account and records of the bankrupt firm.

The bankrupts refused to turn over the books of said firm until the receiver guaranteed that no use would be made of the said books in aid of any criminal prosecution of members of the firm of E. M. Fuller & Co.

Thereafter and on June 27th, 1922, a stipulation was entered into between the attorneys for the bankrupts and the receiver herein, whereby the receiver agreed that no use should be made of the records other than for the civil administration of the estate, and that he would hold the books of account in trust for the bankrupt, and agreed to return said books to the bankrupts upon the completion of his inspection (Stipulations, fol. 31).

Thereafter and on April 6th, 1923, the attorneys for the bankrupts made a written demand upon the receiver for the return of the books of said firm, upon the ground that the said receivership having terminated, the bankrupts were entitled to the books (See demand, fol. 46).

On April 14th, 1923, the trustee petitioned the referee to direct the receiver to turn over the said books to the trustee, and the bankrupts herein filed a petition in opposition to said petition, objecting to the delivery of the books and records to the trustee without a condition providing that said books and records should not be used against the bankrupts in any criminal proceeding, and limiting the use of the books by the trustee to the civil administration of the bankrupts' estate and for no other purpose (See petition, fol. 49).

Thereafter and on the 19th day of April, 1923, an order was made by the referee directing the receiver to turn over the books to the trustee without any conditions or reservations to protect the bankrupts in said order.

On April 19th, 1923, the bankrupts filed a petition to review said order, and exceptions to the order as entered by the referee.

On April 21st, 1923, an order was entered by the United States District Court for the Southern District of New York, dismissing the petition to review, and affirming the order of the referee herein, and also denying a stay pending the appeal from said order to this Court.

On April 24th, 1923, the trustee petitioned the United States District Court for an order directing the attorneys for the bankrupts and the bankrupts themselves to turn over whatever papers of said concern might be in their possession.

Thereafter and on April 25th, 1923, an order was entered directing the attorneys for the bankrupts and

the bankrupts themselves to turn over to the trustee all books, papers and documents belonging to said bankrupt concern then in their possession.

On April 26th, 1923, the United States District Court for the Southern District of New York entered an order staying the order of April 21st, 1923, and April 25th, 1923, until an application could be made for a stay to this Court, pending the hearing and determination of the appeal herein.

The appellants thereupon applied for leave to appeal to this Court upon assignment of errors, and thereupon the appeal was allowed, and on the 27th day of April, 1923, a certified copy filed with the Clerk of this Court.

The bankrupt Edward M. Fuller is now on trial before the Court of General Sessions of the County of New York.

This is an application for a stay pending the hearing and determination of this Court of the appeals from the orders of the United States District Court for the Southern District of New York entered on the 21st and the 25th days of April, 1923.

POINT I.

Unless a stay be granted until the ultimate decision by the United States Supreme Court, the bankrupts will suffer irreparable injury, and the advantage of a favorable decision on this appeal entirely lost.

Judge Mack states in his opinion that which is conceded to be the test applicable to the granting of a stay pending the determination upon appeal, when he stated that if irreparable injury would be done the bankrupts by reason of their failure to obtain a stay, a stay ought to be granted.

Assuming, then, that a stay ought to be granted if irreparable injury would come to the bankrupts pending the appeal, we call this Court's attention to Judge Mack's own ruling that he was in error when he failed to grant a stay, and that he thought a stay ought to be granted. Judge Mack stated very frankly that had he considered the fact that the prosecution was in a State Court, he would have granted a stay, realizing the difference not only in the effect of the constitutional provisions but the various decisions affecting them in the Courts of the State of New York.

The leading case in the State of New York deciding that no constitutional objection can be raised to the introduction of evidence during the course of a trial concerning the manner in which the evidence was obtained is *Adams* v. *N. Y.*, 176 N. Y. 351, 192 U. S. 585, the ruling in the above case holding that no matter how evidence was obtained, the fact that it is presented in Court is sufficient, and no inquiry will be made into the means by which it was obtained, or whether the defendant's constitutional rights were invaded.

In the Supreme Court of the United States, it was held that the fact that papers were illegally taken was not a valid objection to their admissibility in the State Court, and that the Court would consider the competency of the evidence and not the method by which it was obtained. It was within the power of the State to prescribe rules concerning the receipt of evidence. The Court said at page 399:

> "Furthermore it is within the established power of the State to prescribe the evidence which is to be received in the Courts of its own Government."

In the Court of Appeals it had been claimed that the

use of this evidence deprived the party of his constitutional right, but the Court said:

> "In the case at bar the defendant was not sworn as a witness, nor was he required to produce any books and papers * * *. We are of the opinion, therefore, that the defendant was not in any legal sense called upon to be a witness against himself in this criminal proceeding."

The result is that even though the Supreme Court of the United States should decide that these papers should not have been turned over without the bankrupts having been protected, yet the State having once received the papers, and having used them in a State Court, the final decision would be nullified.

Judge Mack, reversing his original opinion, stated as follows:

> "I say that proposition was not argued. I did say that I could not see how any irreparable injury could be done, because I said that you would be able to reserve your rights on any rulings as to the use of his testimony and thereby eventually go to the Supreme Court. I am not at all sure that that was sound, because I was thinking that the prosecution was in the Federal Court, the prosecution, however, is in the State Court, and as between the Federal Court and the State Court there is a reciprocal disregard, because the Federal Court does exactly the same thing * * *. If in this case these books are delivered to the Trustee, and the Trustee is then subpoenaed in the State Court, the State Court gets that evidence, whether the Trustee's holding is valid or not. Whether my order directing that it be delivered to him without reservations or any rights is valid or not, the State Court can use them and there can be no Federal question involved under the Fourth and Fifth Amendments as to the use

of them. There is no violation of the rights under these amendments by the State Court, because binding only on the Federal authorities * * *. I assume that under the *Adams* case the use of evidence of this kind obtained by the State authorities as this would be obtained, would not be deemed as contravening the said Constitution. If the Supreme disagrees with me, then by reason of my decision the defendants will have lost, and irreparably have lost, rights which they otherwise would not have lost, because I would have put it in the power of the State to subpoena the Trustee, who will have the books to use as evidence against these defendants, documents which the State could not have gotten but for the exercise of this power by me. * * * It follows that if I am wrong on the merits of this case, if the Supreme Court is of the opinion that I ought never to have entered the order compelling them to give up books to the Trustee, they will have suffered irreparable damage. That is Mr. Fallon's argument and I think it is sound. * * * It is because of the importance of this matter in its bearings in other situations, as well as because of its effect upon these immediate parties, that it ought to be settled, must be settled, and can be settled only by the Supreme Court. Now, I am satisfied, unless you can present something more, that I spoke too hastily the other day in saying that there could not be irreparable damage. I then refused a stay because, as I saw it then, there could not be any irreparable damage. In my judgment, I overlooked the fact that this was a State Court proceeding, and the use of these books therein would not be ground for reversal as violating the defendants' rights under the Fourth and Fifth Amendments."

POINT II.

Books and papers are within the protection of the Fifth Amendment.

On both of these appeals, substantially the same questions are presented, and both appeals in the last analysis present for decision the question whether or not a bankrupt can be compelled by the trustee to deliver his books to the trustee, although they contain matters that might tend to degrade and incriminate him.

Judge Mack in his determination agrees that so far as the appeal with reference to the production of the books by the bankrupts themselves is concerned, that those books were properly in the possession of the bankrupts at the time the trustee was appointed.

It is unnecessary to argue that no defendant could be served with a subpoena to produce his books in any criminal proceeding against himself. The question following this statement is whether or not a bankrupt is deprived of the rights accorded to any other defendant solely because he has been thrown into involuntary bankruptcy.

Boyd v. *U. S.*, 116 U. S. 616, 232 U. S. 383.

The *Boyd* case raised the question squarely and held that the seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself, and their use in any prosecution for a crime, penalty or forfeiture is within the prohibition of the Fifth Amendment.

In *Weeks* v. *U. S.*, 232 U. S. 383, 391, the question arose as to whether private papers illegally taken by

the Marshal and in violation of the Fourth Amendment could be used against the defendant. The Court held they could not, and there said:

> "The principles laid down in this opinion affect the very essence of Constitutional liberty and security. They reach farther than the concrete form of the case then before the Court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence, but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.
>
> In *Bram* v. *United States*, 168 U. S. 532, this Court, in speaking by the present Chief Justice of *Boyd's* case, dealing with the Fourth and Fifth Amendments, said (544):
>
> 'It was in that case demonstrated that both of these Amendments contemplated perpetuating, in their full efficacy, by means of a Constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change.'"

The establishment of the rule that books and papers are within the protection of the Fifth Amendment, is entirely unnecessary at this time, and the question here presented concerns the application of those well established rules to bankrupts, and whether or not a bankrupt, although compelled to surrender possession of his books, may protect himself in his Constitutional rights

against the production of his books or papers to be used as evidence against him in a criminal proceeding.

In this very case, Judge Augustus N. Hand stated:

> "The books got into the receiver's possession with all the bankrupts' rights reserved and the receiver only held them to aid his civil administration. When it comes to the use in criminal proceedings they are the property of the alleged bankrupts. Upon application for use in such proceedings this Court is bound to say that the bankrupt runs no risk of losing this privilege which was guaranteed upon his surrender of the books and that their contents are not disclosed to authorities entrusted with enforcing criminal law."

It is clear that the books today are in the possession of the bankrupts in the same way as if they had never been turned over to the receiver as the receiver's possession is their possession. Can the receiver be compelled to turn the books, which he holds for the account of the bankrupts, over to the trustee?

The argument is made that the trustee has the legal title to the bankrupts' property and that these books belong to him and that, therefore, irrespective of the question of incrimination, he is entitled to the property that belongs to him. The situation is the same as though E. M. Fuller & Co. had the books in their own possession and as though the trustee should demand the books from them; that they took the position that they would not turn over the books because the books might incriminate them and the trustee would then say: "But the books are my property." Even then we take it that the bankrupts would not be compelled to turn the books over unless their constitutional rights were protected.

The question whether the trustee was in a different position from the receiver was considered just this last

year by Judge Learned Hand in *Re E. D. Dier & Company*, 279 Fed. 274, February, 1922. The Court said:

> "In the case at bar there is no trustee, only a receiver and a receiver has no title, but that I conceive makes no difference * * *. The test, I take it, is whether the surrender was resisted when the receiver demanded possession."

It must be admitted that the point was different then, but the only difference is one of "title." The question depends upon possession, not title.

We believe that this is the latest expression of judicial opinion, but the history of the subject is interesting. In *Boyd* v. *U. S.*, 116 U. S. 616, the Court said:

> "The compulsory production of a man's private papers to be used against him is equivalent to compelling him to be a witness against himself in a prosecution for a crime, penalty or forfeiture and is equally within the prohibition of the Fifth Amendment."

This would seem to answer the proposition, if we should assume that E. M. Fuller & Co. had possession of the books today. Even though the trustee is vested with legal title, yet compulsory production of the books could not be ordered.

For the question is not at all one of title but one of possession. Again, as Judge Hand said in *Re E. D. Dier & Co.*, 279 Fed. 274, production depends as little upon compelling the incrimination of a person by producing evidence against himself when the possessor has no title as when he has. The possessor alone can produce, not the owner, and privilege protects only against such compulsion.

In *Re Hess*, 134 Fed. 109, decided the point squarely. There petitions were filed by the trustee in bankruptcy for orders to compel the bankrupt to deliver certain assets consisting of books to the trustee. The bankrupt contended that the books contained evidence which might tend to incriminate him. The Court said:

> "Here the question is squarely raised as to whether or not the bankrupt is compelled to deliver his books and papers to the trustee * * * even though" that they "tend to incriminate him."

It was held that the bankrupt could not be compelled to turn over the books which might tend to incriminate him, but that his conclusion on the matter was not final and the bankrupt was, therefore, ordered to bring his books before a referee in order to take evidence as to whether the bankrupt's position was taken in good faith. The referee was to report to the Court as to his conclusions. In this matter the bankrupt was to be protected. The Court said:

> "Where under these circumstances the bankrupt pleads this privilege he should be required to bring the books and papers which he alleges would incriminate him before either the Court or the referee in bankruptcy and when it is made to appear that his plea is well founded the Court will make such order as may fairly protect him from the discovery of such evidence and at the same time enable the trustee to obtain such evidence from the books as is always necessary and indispensable in the administration of bankrupt estates."

This case has been cited many times with approval, the last we believe having been in *Re Veletsky*, 280 Fed. 137, September, 1921, which again concerned the question of the trustee's right to the books. The above quotation

from the *Hess* case was made a part of the opinion. The syllabus there states:

> "A bankrupt who relies upon his constitutional privilege not to testify against himself as a ground for refusal to turn over all of his assets to the trustee should turn over to the trustee such assets as he claims would not incriminate him and submit to the Court the question as to whether the delivery of the other assets would, in fact, incriminate him."

This again bears out the contention made above, that the question of title is not important. The question is one of possession for here the Court said that the bankrupt could not be compelled to turn over to the trustee any assets which would tend to incriminate him. In that case the Court quoted from the words of Chief Justice Marshall, who, in June, 1807, in the Burr trial, said:

> "It would seem that a Court ought never compel a witness to give an answer which would form a necessary and essential part of a crime which is punishable by laws."

And in reference to that statement of Chief Justice Marshall the Court in the *Nelctsky* case continued:

> "Thus it will be seen how securely this right is given and guaranteed a citizen by the Courts in their construction of the law."

And of course the language was held there as applicable to books and assets as well as to oral testimony. Apparently those who wish to prosecute bankrupts even to the extent of robbing them of their constitutional rights as American citizens, have a zeal which is not tempered by the constitutional law and the protection of the citizen established by the first Chief Justice of the United States

over a century ago. When the question of personal interest is involved and when one is enthusiastic in the prosecution of his fellow-men he is inclined to forget the traditions and the history of the United States however sacred such traditions and history may be. See also *In re Harris,* District Court, E. D., New York, 1902, 117 Fed. 356; *In re Hark*, District Court, E. D., Penna., April, 1905, 135 Fed. 986; *In re Tracy*, District Court, E. D., New York, February, 1910, Opinion of Judge Hand, 177 Fed. 532. In the last case the Court, referring to the trustee, said:

> "It has been held in a number of cases that the bankrupt may resist the delivery of his books if he claims they are incriminatory."

The question would be so free from doubt as to leave no room for argument were it not for the confusing dictum in *Re Harris*, 221 U. S. 274. There the bankrupt surrendered his books to the receiver under an order of the Court, that they could not be used against him in any criminal proceeding. The question certified to the United States District Court was whether such an order compelling the delivery of the books to the receiver under such circumstances was a proper exercise of authority of the bankruptcy Court. It was held that it was. The Court then referred to the fact that had a trustee been appointed he would have title to the books and that since the bankruptcy Court could enforce the title in favor of the trustee it could enforce possession *ad interim* in favor of the receiver and the Court added:

> "In the properly careful provision to protect him from the use of the books in aid of prosecution the bankrupt got all he could ask."

In other words, properly considered, the *Harris* case strongly leans to our position for while the Court said that the receiver could get the books by reason of the

fact that a trustee could get them it also said that the bankrupt had the right of protection against the use of the books in aid of prosecution and it referred to the order of the District Court as "properly careful provision."

That this is the proper understanding of the *Harris* case is clear from *Johnson* v. *United States*, 228 U. S. 457 (1912), where the syllabus states that the "Courts proceed step by step. The *Matter of Harris*, 221 U. S. 274 established simply that the transfer of the books of a bankrupt to a trustee could be required and left undetermined the question as to what use the books could be put."

In the *Johnson* case the bankrupts had transferred the books without objection and therefore the Court held they might be used. The Court there said:

> "* * * We now have to consider whether the cautious statement in the former case," referring to the *Harris* case, "created a limit of law in the case *where no rights, if there were any, were saved when the books were transferred.*"

But clearly from this, a different rule is applied where rights are saved when books are transferred and this is the meaning of both the *Harris* and *Johnson* cases.

Thus, properly considered, there is no conflict in authorities. The *Hess* case and others following it held that the trustee could not have possession of material which the bankrupt could show to the Court would tend to incriminate him. The *Harris* case, *supra*, held that the bankrupt would be protected by the Court's order and that was all he could ask. The *Johnson* case, *supra*, made clear that this was the meaning of the *Harris* case, but denied relief because the papers had been voluntarily turned over to the trustee and the *Dier* case, the latest ruling on the subject, contained the clear state-

ment that the receiver's office is not different from the trustee and the Court there particularly pointed out that the decision in the *Harris* case in the District Court, 161 Fed. 292, was still good law.

POINT III.

The Bankruptcy Act, if interpreted to deny a defendant his Constitutional rights, would itself be unconstitutional in so far as any such result might be accomplished.

If a defendant has this constitutional protection, then any law or act of Congress must be unconstitutional to the extent that it would deprive him of this protection.

It seems to be clear that if the bankrupts still had title to their books and papers, then they could not be compelled to produce them and thus incriminate themselves, but it is contended that since title passed to the trustee in bankruptcy, they could not refuse to turn over to the trustee property which belonged to him. In this connection were cited examples from cases like *Johnson v. U. S.*, where it is argued that the protection could not extend to a thief who might write on the fly leaf of a book a statement which would incriminate him and thus refuse to turn the book over to the true owner.

But we are dealing here with a situation where the trustee becomes owner by reason of a statute. If the statute must be interpreted so as to deprive the defendant of his constitutional right, then the statute would be unconstitutional, but it is contended that in the light of the *Hess* case, 134 Fed. 109, and others, the statute can be otherwise interpreted and the protection can still be afforded.

Suppose the Legislature of this State should pass a law to the effect that if a man ever claimed that papers were incriminating, such papers should *ipso facto* become the property of a trustee. Under such circumstances, anyone asserting the privilege would be met by the proposition that he no longer owned the property and this law would therefore deprive him of that privilege. Could it be claimed that such a law would conform to the Constitution—and yet, Section 70 of the Bankruptcy Act does this very thing. Unless the bankrupt is protected by the limitations which appear in the *Hess* case and in the *Harris* case, Section 70 of the Bankruptcy Act would be contrary to the Constitution.

This would seem to be the proper conclusion in the light of *Counselman* v. *Hitchcock*, 142 U. S. 547, where the Court construed a section of the revised statutes which provided that evidence should not be used against a party in criminal proceedings. The Court said at page 565:

> "Legislation cannot detract from the privilege afforded by the Constitution * * * but a mere act of Congress cannot amend the Constitution even if it should engraft thereon such a proviso."

The Court further said at page 581:

> "We are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said,

> it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of Courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

At page 585 the Court said:

> "It is quite clear that legislation cannot abridge a constitutional privilege and that it cannot replace or supply one * * *. We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States."

The Court no doubt had this in mind when it stated in its opinion that a man is presumed to know that if he goes into bankruptcy the title to his books would pass to the trustee and that he would lose any constitutional right of protection, since such right would follow title rather than possession. But likewise in the examples suggested above of the passage of the law which would provide that title to all documents be vested in a public trustee in the event that a defendant pleads his constitutional privilege, it might be said that after the passage of such a statute, one would no longer have this privilege

since *ipso facto* title had passed to the public trustee and possession must follow title. If the Court is of the opinion that such a statute would be unconstitutional, we think it necessarily follows that this section of the Bankruptcy Act would be unconstitutional if it is interpreted to mean that title in the trustee means possession free from any limitation. In order to avoid this, however, the middle ground can be taken that books and papers should be turned over but subject to stipulation.

Possibly, in support of this, one might refer to the last sentence in the *Harris* case where the Court stated the provision of limitation to be a "properly careful" one. If this is not so, what is meant by the word "properly"?

POINT IV.

Wherefore, appellants ask that a stay be granted herein pending the ultimate determination of this Court.

Attorneys for Bankrupts.

WILLIAM J. FALLON,
EUGENE F. MCGEE,
HAYS, ST. JOHN & MOORE.

Supreme Court of the United States.

OCTOBER TERM, 1922.

No.

IN THE MATTER

OF

EDWARD M. FULLER AND WILLIAM F. McGEE, INDIVIDUALLY AND AS CO-PARTNERS, DOING BUSINESS AS E. M. FULLER & CO.,

Bankrupts.

MEMORANDUM FOR GEORGE C. SPRAGUE, TRUSTEE IN BANKRUPTCY.

FRANCIS L. KOHLMAN,
Counsel for Trustee.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1922.

No.

IN THE MATTER

OF

EDWARD M. FULLER and WILLIAM F. McGEE, individually and as co-partners, doing business as E. M. FULLER & COMPANY,

Bankrupts.

MEMORANDUM FOR GEORGE C. SPRAGUE, TRUSTEE IN BANKRUPTCY.

Statement of the Case.

The Trustee herein makes specific reference to his Affidavit as to all the facts of the situation. The specific matter now before the Court is an application by the Bankrupts for a stay from the execution of an Order of the United States District Court, dated April 20th, 1923, affirming the Order of Harold P. Coffin, Esq., Referee herein, dated the 19th day of April, 1923, under the terms of which Samuel Strasbourger, Receiver of the above-named Bankrupts, was authorized, empowered and directed to deliver to the Trustee of the above-named

Bankrupts all of the books of account, papers and other documents of every kind whatsoever of the Bankrupts in his possession, as such Receiver. The Court has a further application before it for a stay from an Order of the United States District Court, dated April 24th, 1923, by which the Bankrupts and their Attorneys were severally directed to turn over, deliver and surrender to the Trustee forthwith all books, papers, records, and other documents of the Bankrupts enumerated in the receipts annexed to the Petition of the Trustee, duly verified the 20th day of April, 1923, as they severally had the same in their possession or control at time of service of notice of the application for the said Order by the Trustee.

The Trustee demanded the said books, documents and Memoranda from the Receiver; the Receiver sought the instructions of the Court; the Bankrupts opposed the application, and attempted to limit the use of said books by the Trustee to the civil administration of the Bankruptcy. The Referee and the United States District Court for the Southern District of New York ordered, adjudged and decreed that the Trustee was entitled to the said books of account without limitation, restriction or control in any way. The records of this case show that three separate applications for stay enjoining the delivery of said books to the Trustee were denied,—one by the Referee, one by the United States District Court (Hon. Julian W. Mack), and one by Mr. Justice Brandeis, one of the Associate Justices of the United States Supreme Court.

The Hon. Julian W. Mack, however, on April 24th, 1923, granted a stay from the said Orders upon the express condition that the Bankrupts

apply to the United States Supreme Court for a stay, and he has stated that the time of the application for a stay to the United States Supreme Court from said Orders must be made not later than Friday, April 27th, 1923.

Questions Involved.

The questions presented by the present application for a stay are:

FIRST: Whether this Court has jurisdiction of a Writ of Error or Appeal, hereafter to be prosecuted, from the several Orders of April 20th, 1923, and April 24th, 1923, of the United States District Court for the Southern District of New York. Concretely, whether or not the said several Orders are *final* Orders or Decrees, within the meaning of the *Judiciary Act*, and therefore reviewable in the Supreme Court of the United States by Writ of Error or Appeal. If such Orders are not reviewable, then, plainly, this Court will not now interfere with the Orders of the District Court by way of stay or otherwise.

SECOND: Whether a Trustee in Bankruptcy is entitled to the title and possession of property of the Bankrupts, including memoranda, books of account, and other documents without restriction, limitation, or other qualification, and whether or not the protection of the Fourth and Fifth Amendments of the Federal Constitution extends to books and papers, title to which vests in a Trustee in Bankruptcy.

POINT I.

The Orders of the United States District Court, dated April 20th, 1923, and April 24th, 1923, are not reviewable in this Court.

In order to obtain an Appeal or Writ of Error in this Court, the Decree or Order so sought to be reviewed must be a final Order. An Appeal to the Supreme Court lies only from final Orders or Decrees. (*In Re Lennon*, *150 U. S. 393.*) The Trustee submits that the several Orders now sought to be reviewed are not final Orders. An Order is final if the whole purpose of the suit is accomplished by it. The whole purpose of this proceeding is to determine the rights of creditors with respect to the Bankrupts' property. The Orders, the effect of which is to give to the Trustee title and possession of the books of the Bankrupts without qualification, restriction or limitation, are only incidental interlocutory forms of relief collateral to the main proceeding. In the case of *Alexander* vs. *United States* (*201 U. S. 117*), in a suit in a Circuit Court of the United States brought by the United States against corporations for violation of the Anti-Trust Law of July 2nd, 1890, a witness refused to answer questions, or produce books before the examiner, on the ground of immateriality, also pleading the privileges of the Fifth Amendment. The Court entered Orders requiring the appellants to answer the questions put to them, and to produce the books, papers and documents requested. Appeals were allowed to the Supreme Court of the United States. The appellants contended that the Orders of the Circuit Court

constituted practically independent proceedings, and amounted to final judgments. The Court, in its opinion, quoted the opinion of Judge Van Devanter in the case of *Nelson* vs. *United States* (No. 490), in error to the Circuit Court of the United States for the District of Minnesota:

> "I am of opinion that the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence in their possession is not a final decision; that it more appropriately is an interlocutory ruling or order in the principal suit, and that if the witnesses refuse to comply with it and the court then exercises its authority either to punish them or to coerce them into compliance that will give rise to another case or cases to which the witnesses will be parties on the one hand and the Government, as a sovereign vindicating the dignity and authority of one of its courts, will be a party on the other hand. I have no doubt that a judgment adverse to the witnesses in that proceeding or case will be a final decision and will be subject to review by writ of error, but not by appeal. My opinion is also that the parties to the principal suit cannot appeal or obtain a writ of error from that decision."

The situation in the instant case is, in all respects, similar to *Alexander* vs. *United States, supra.* The Bankrupts have been ordered to turn over the books to the Trustee. Such an Order is in no respects a final decree or Order. "It more appropriately is an interlocutory ruling or order in the principal suit". Therefore, it follows that this Court will not interfere by way of stay or otherwise with the execution of the Orders of the United States District Court, dated April 20th, 1923, and April 24th, 1923.

POINT II.

The Trustee in Bankruptcy is entitled to the books of account and other documents of the Bankrupts without restriction, limitation or qualification, and the turning over of the possession of these books is not a giving of evidence within the constitutional protection of the Federal Constitution.

The intimations of this Court in *Matter of Harris* (*221 U. S. 274*), and in the matter of *Johnson* vs. *United States* (*228 U. S. 457*), are all in accord with the opinion of Judge Mack. As Mr. Justice Holmes says:

> "* * * If a trustee had been appointed, the title to the books would have vested in him by the express terms of Section 70, and the bankrupt could not have withheld possession of what he no longer owned, on the ground that otherwise he might be punished. That is one of the misfortunes of bankruptcy if it follows crime. The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story."

It follows, therefore, that under the express provisions of the Bankruptcy Act, the Trustee has the title to the Bankrupts' property, including memoranda, books of account, and other documents. There is no conflict of constitutional rights between the Bankruptcy Act and the Fourth and Fifth Amendments of the Federal Constitution; there is no question of unconstitutionality of the provision of the Bankruptcy Act that passes title to these papers. If, in the light of the Bankruptcy Act, a

person puts incriminating evidence upon documents as to which he might lose the title, he cannot thereafter urge that this section of the Bankruptcy Act was unconstitutional as requiring him to give incriminating evidence against himself. He has acted with legal knowledge that the title to these books would pass to a trustee in case he should become bankrupt. Therefore, in the language of Judge Mack, "he has acted at his peril".

It seems entirely clear that the Trustee, becoming vested with the title to the Bankrupts' property, is entitled to the immediate and absolute possession of same. The Bankrupts have ceased to be the owners; therefore, they cannot put any limitations on the use thereof.

We submit that the Orders of Judge Mack were entirely correct in directing the Bankrupts and other persons in possession of the Bankrupts' property to surrender and deliver to the Trustee all the property formerly of the Bankrupts. No constitutional right guaranteed the Bankrupts under the Fourth and Fifth Amendments of the Federal Constitution has been infringed. It may entirely be that the possession of these books by the Trustee may furnish evidence prejudicial to these Bankrupts in prosecutions now pending, or hereafter to be brought in both State and Federal Courts. In this aspect of the case *Johnson* vs. *United States* (*228 U. S. 457*) seems exactly in point. Mr. Justice Holmes there said:

> "* * * A party is privileged from producing the evidence but not from its production. The transfer by bankruptcy is no different from a transfer by execution of a volume with a confession written on the fly leaf. It is held that a criminal cannot protect himself by getting the legal title to corporate books.

Wheeler vs. *United States*, (*226 U. S. 478.*) But the converse proposition is by no means true, that he may keep the protection from the introduction of documentary evidence that he would have had while he retained it, after the title and possession have gone to someone else.

"It is true that the transfer of the books may have been against the defendant's will, but it is compelled by the law as a necessary incident to the distribution of his property, not in order to obtain criminal evidence against him. Of course a man cannot protect his property from being used to pay his debts by attaching to it a disclosure of crime. If the documentary confession comes to a third hand *alio intuitu*, as this did, the use of it in court does not compel the defendant to be a witness against himself."

We submit that the strong intimations of this Court indicate that the title and possession of the Bankrupts' property passed absolutely to the Trustee in Bankrruptcy; that the transfer or surrender of said books of account to the Trustee, and the subsequent use thereafter, is not a giving of evidence within the constitutional protection.

Counsel for the Bankrupts rely on *People* vs. *Adams* (*176 N. Y. 351*), where it is expressly stated that Articles Fourth and Fifth of the Amendments to the Constitution of the United States do not apply to actions in the State Court. The Trustee submits that this is, in all respects, an irrelevant consideration.

The question before this Court is, in the first instance, the title of the Trustee to the property. If that title be absolute, then the transfer of those books does not constitute a violation of any rights of the Bankrupts under the Fourth and Fifth Amendments of the Federal Constitution, and whether or not those Amendments are disregarded

in the State Courts is of no consequence to the merits of the present application. It seems entirely clear that the Trustee in this case has the absolute ownership and possession of these books, and that their use thereafter is an incident following the devolution of ownership and the transfer of possession.

This cursory consideration of the merits of the case shows clearly that the application of the Bankrupts for a stay must be denied. In conclusion the Trustee urges that the Court is without jurisdiction to review the Orders of April 20th, 1923, and April 24th, 1923, of the United States District Court for the Southern District of New York, upon the ground that such Orders are not *final* Orders or Decrees, and that therefore the application for a stay, with respect to the execution of said Orders, must in all respects be denied. And, secondly, upon the merits, no rights guaranteed or safeguarded to the Bankrupts by the Fourth and Fifth Amendments of the Federal Constitution are violated by the surrender and turning over of the books to the Trustee.

Dated, New York, April 27, 1923.

Respectfully submitted,

FRANCIS L. KOHLMAN,
Counsel to the Trustee.

Supreme Court of the United States.

OCTOBER TERM, 1922.

No.

IN THE MATTER

OF

EDWARD M. FULLER AND WILLIAM F. McGEE, INDIVIDUALLY AND AS CO-PARTNERS, DOING BUSINESS AS E. M. FULLER & CO.,

Bankrupts.

AFFIDAVIT OF GEORGE C. SPRAGUE, TRUSTEE IN BANKRUPTCY.

FRANCIS L. KOHLMAN,

Counsel for Trustee, SPRAGUE.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1922.

No.

IN THE MATTER OF EDWARD M. FULLER and WILLIAM F. McGEE, individually and as co-partners doing business as E. M. FULLER & Co., Bankrupts.	In Bankruptcy. Affidavit of Trustee.

UNITED STATES OF AMERICA, Southern District of New York, } ss.:

GEORGE C. SPRAGUE, being duly sworn, deposes and says:

I am the Trustee in Bankruptcy of EDWARD M. FULLER and WILLIAM F. McGEE, individually and as copartners doing business as E. M. FULLER & Co., Bankrupts, appointed, qualified, and acting.

I was appointed Trustee on or about the 31st day of March, 1923, at a meeting of creditors duly called for that purpose. I filed my bond, which was duly approved by the Court, and since that time have been acting as such Trustee.

An involuntary petition in Bankruptcy was filed against the above-named Bankrupts on or about June 26th, 1922, and SAMUEL STRASBOURGER, Esq.,

of the City of New York, was appointed Receiver. The Receiver, as I am informed and believe, took possession of the books of account of the Bankrupts, under a stipulation, the effect of which was to limit and restrict the use of said books by the Receiver, solely to the civil administration of the Bankrupts' Estate and to enable the said Receiver to check up the assets and liabilities of the Bankrupts' firm. The stipulation further provided that said books were to be held by the Receiver, to be returned to the bankrupts upon the completion of the inspection by the Receiver, and it was understood no one should have access to these books but the Receiver, his attorneys and accountants, the Bankrupts through their counsel reserving all the constitutional rights of the Bankrupts, E. M. FULLER & Co., and the individual copartners thereof, in regard to the use of the books in any criminal proceeding.

Upon my appointment as Trustee, as hereinbefore stated, I made a written demand upon the Receiver for the books of account of these Bankrupts in the possession of the said Receiver under the aforesaid stipulation, contending that I was entitled to those books absolutely and that the Bankrupts had not the power to determine the terms upon which the Trustee acquired possession, nor the power to limit the use of such books by said Trustee.

Thereafter, I applied to the Referee for an order to show cause, directed to the Receiver herein and Messrs. HAYS, ST. JOHN & MOORE, attorneys for the above-named Bankrupts, why an order should not be made authorizing, directing, and empowering the Receiver to turn over the said books of account, papers, and documents of the Bankrupts in his possession to me as Trustee of the above-named Bankrupts. Upon the return of said order to show cause before the Referee, the Receiver asked the in-

structions of the Court. The Bankrupts, through their counsel, opposed the order so sought and contended that the Trustee should only be permitted to receive such books under the same stipulations, conditions, and restrictions under which the Receiver held possession. The Referee, Mr. HAROLD P. COFFIN, granted the order and directed "that SAMUEL STRASBOURGER, Receiver of the above-named Bankrupts, be and he hereby is authorized, empowered, and directed to deliver to the Trustee of the above-named Bankrupts all of the books of account, papers, and other documents in his possession as such Receiver." (See order of Referee of April 19, 1923.)

Application was made to the Referee on the argument of the above motion by the attorneys for the Bankrupts for a stay, pending the determination of the United States District Court, on the petition to revise and review the Referee's order of April 19th, 1923. The Referee refused to grant a stay, on the ground that in his opinion there would be no irreparable injury to the Bankrupts, resulting from the compliance with his order.

The attorneys for the Bankrupts immediately applied to Hon. JULIAN W. MACK, United States Circuit Judge, sitting in the United States District Court for the Southern District of New York, for a stay from the execution of the said order of April 19th, 1923.

On the 19th day of April, 1923, my attorneys appeared before the Hon. JULIAN W. MACK, and an argument was forthwith had upon the merits of the main question and upon the application for a stay. At the conclusion of the presentation, which was very exhaustive, the Hon. JULIAN W. MACK delivered his opinion, sustaining the ruling of the

Referee and dismissing the petition to revise. Thereupon, the attorneys for the Bankrupts applied for a stay to Hon. JULIAN W. MACK from the execution of the order of the Hon. JULIAN W. MACK, dismissing the petition to revise and the said Hon. JULIAN W. MACK denied the application for such a stay. (See order of Hon. JULIAN W. MACK dated April 20, 1923.)

On April 21st, 1923, the Bankrupts, through their counsel, Mr. WILLIAM J. FALLON, of New York City, applied to Mr. Justice BRANDEIS, one of the Associate Justices of the United Supreme Court, for a stay from the order of Hon. JULIAN W. MACK of April 20th, 1923, stating to Mr. Justice BRANDEIS that he desired said stay in order that he might have an opportunity to review the issue presented in Judge Mack's order in the United States Supreme Court.

My attorneys attended before Mr. Justice BRANDEIS, one of the Associate Justices of the Supreme Court, at his Chambers in Washington, D. C., on April 21st, 1923, and opposed the application for such a stay, and said application for said stay was denied.

I am informed by my counsel that in denying the application for such a stay, Mr. Justice BRANDEIS stated to counsel for the Bankrupts that such extraordinary relief was only given in extraordinary situations; that this situation was not an extraordinary one and that his refusal to grant the stay would not result in the Bankrupts suffering any irreparable harm.

The Bankrupts have been denied three separate applications for three distinct stays from three judicial officers of different powers and jurisdictions.

On the 20th day of April, 1923, I petitioned the Court for an order directing Messrs. HAYS, ST. JOHN & MOORE, attorneys for the Bankrupts, and Messrs. FALLON & MCGEE, counsel for EDWARD M. FULLER and WILLIAM F. MCGEE, in criminal proceedings now pending, to deliver forthwith to me as Trustee certain papers, documents, and memoranda set forth in certain receipts attached to my petition, duly verified the 20th day of April, 1923.

This application was heard on April 20th, 1923, and was thereafter adjourned to April 23, 1923, and, finally, to April 24th, 1923. The attorneys for the Bankrupts, Messrs. HAYS, ST. JOHN & MOORE, and Messrs. FALLON & MCGEE, appeared in opposition to said motion. The said application was granted and an order entered thereon. (See order of Hon. JULIAN W. MACK of April 24th, 1923.)

At the conclusion of said argument, counsel for the Bankrupts stated that they desired to review the order of Hon. JULIAN W. MACK of April 20th, 1923, above referred to, and the order of April 24th, 1923, in the United States Supreme Court as they believed that constitutional rights of an important and far-reaching character were involved and that they were preparing their record to have the questions presented in said orders reviewed in the United States Supreme Court. Thereupon, Judge Mack stated that he would grant the Bankrupts a stay from the execution of the said orders of April 20th and April 24th, 1923, so as to furnish them opportunity to apply to the United States Supreme Court for a stay, the said application to be made to the United States Supreme Court, not later than Friday, April 27th, 1923.

The Bankrupts, through their counsel, are now applying to the United States Supreme Court for

a stay in order to bring up for review before this Court the orders of April 20th and April 24th, 1923.

The Trustee submits that the application for a stay should be denied for the following reasons:

(1) This Court, the Trustee respectfully suggests, does not possess nor will it assume, jurisdiction to review or revise the orders of the United States District Court for the Southern District of New York, of Hon JULIAN W. MACK, dated April 20th and April 24th, 1923, for the reason that such orders are interlocutory orders issued as incidental to the administration of an estate and collateral to the main orders in that case. The proceeding under which the Trustee sought to obtain possession of these books was simply incidental to his administration of the Estate and any order entered thereon must, necessarily, be an incidental, secondary, and interlocutory order. The relief sought was interlocutory, not final. There was no proceeding in and of itself to obtain possession of these books. It was incidental to the bankruptcy proceeding.

The Trustee respectfully suggests that, inasmuch as this Court does not possess, nor will it exercise jurisdiction of the orders sought to be reviewed, it will, therefore, not grant a stay from the said orders.

It is submitted that the orders must in and of themselves be reviewable in this Court as a condition of the Court granting any provisional relief in advance of hearing the writ of error or appeal.

(2) The fact that these Bankrupts claim that their constitutional rights are involved, or may be in question, does not, necessarily, give them the privilege of having their rights determined in this Court, unless the order sought to be reviewed is a final order or decree.

(3) There is no merit in the position of the Bankrupts. The Trustee upon his appointment and qualification is vested by operation of law with the title of the Bankrupts to all property, and, especially, to all documents relating to that property. He is the owner of that property and he is entitled, therefore, to the possession thereof without limitation, restriction, or qualification. The Bankrupts have lost title and possession. If, as a consequence of that devolution of title and change of possession, the Bankrupts become exposed to prosecution, that, in the language of Mr. Justice Holmes, is: "one of the misfortunes when bankruptcy follows crime" and "the turning over of the possession of those books is not a giving of evidence within the constitutional protection." (Opinion of Judge Mack.)

(4) The intimations of this Court, namely:

Matter of Harris, 221 U. S. 274, and
Matter of Johnson, 228 U. S. 457,

are in accord with the position of the Trustee herein and confirm the title of the Trustee to the books, papers, and memoranda of account of the Bankrupts without restriction, limitation, or qualification.

For the considerations above presented, the Trustee respectfully asks that the application of the Bankrupts for a stay from the orders of the United States District Court, for the Southern District of New York of April 20th and April 24th, 1923, be denied.

GEORGE C. SPRAGUE.

Subscribed and sworn to before me this 26th day of April, 1923.

Office Supreme Court, U. S.
FILED
FEB 23 1923
WM. R. STANSBURY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

1-307

No.

ROLAND R. POTHIER, APPELLANT,

against

WILLIAM R. RODMAN, UNITED STATES MARSHAL, AND HENRY C. HART, UNITED STATES COMMISSIONER, APPELLEES.

(MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS.)

The appellant in the court below appears by Davis G. Arnold, Counsel, and moves the court for an order allowing appellant to proceed in the above entitled cause *in forma pauperis* and to prosecute his appeal without being required to prepay fees or costs and the giving of security therefor before or after the bringing of these proceedings, and to that end he tenders the affidavit of Davis G. Arnold, his Counsel.

Briefly stated, the object of the motion is to enable the appellant below to prosecute his appeal from the order of the

District Court of the United States for the District of Rhode Island on his petition for writ of *habeas corpus* and certiorari:

1. October 23, 1918, Maj. Alexander P. Cronkhite met his death on the Camp Lewis Military Reservation, Pierce County, Washington.

2. March 25, 1921, a complaint charging manslaughter was filed against Roland R. Pothier, the appellant, and he was arrested.

3. March 30, 1921, the Attorney General of the United States by telegram to the United States District Attorney at Seattle, agreed that there was no Federal jurisdiction over the death of Major Cronkhite and directed that the matter be turned over to the Prosecuting Attorney, Pierce County, State of Washington.

4. July, 1921, by direction of the Attorney General of the United States, the appellant was discharged from arrest under the warrant charging manslaughter.

5. October 13, 1922, the Grand Jury of the United States of America for the Southern Division of the Western District of Washington, indicted Roland R. Pothier, the appellant, and Robert Rosenbluth, charging them with having willfully murdered Alexander P. Cronkhite within and on lands theretofore acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof, and within the Southern Division of the Western District of Washington, to wit, Camp Lewis Military Reservation.

6. October 19, 1922, Roland R. Pothier, the appellant, was arrested and immediately produced before Henry C.

Hart, United States Commissioner for said District of Rhode Island, under warrant to apprehend, and during the absence of his Attorney of Record was advised by the United States District Attorney to plead "Not Guilty" and was forthwith committed to the custody of the Marshal and keeper of the Providence County jail without bail.

7. December 6, 1922. Roland R. Pothier, appellant, petitioned for a writ of *habeas corpus* and for writ of certiorari directed to said Henry C. Hart, Esq., United States Commissioner.

It is contended on behalf of Roland R. Pothier, appellant, that no offense was committed triable in the Western District of Washington; that no crime has been committed against the United States; that the land upon which it is alleged that said crime was committed was not reserved or acquired for the exclusive use of the United States and was not under the exclusive jurisdiction thereof; that the land upon which it is claimed that said crime was committed was under the exclusive jurisdiction of the State of Washington.

That writ of certiorari should have been issued directing the said Henry C. Hart, Esq., United States Commissioner for the District of Rhode Island and Commissioner under the laws of the United States concerning the removal of persons charged with the violation of the laws of the United States, pursuant to Section 1014 of the Revised Statutes, directing him to certify to the District Court for the District of Rhode Island all the proceedings which took place before him and all the evidence that was offered before him in the said proceedings, which resulted in the commitment of Roland R. Pothier to the custody of the United States Mar-

shal and the keeper of the Providence County jail without bail; the said Commissioner finding that probable cause being shown to believe the said Roland R. Pothier had committed said offense as charged.

8. The bail of Robert Rosenbluth, who was indicted with Roland R. Pothier, has been discharged and the petition of the United States Attorney for warrant of removal of the said Robert Rosenbluth has been denied in the United States District Court for the Southern District of New York. The United States Commissioner for the Southern District of New York having found that the land upon which it is alleged that the said crime was committed was not reserved or acquired for the exclusive use of the United States and was not under the exclusive jurisdiction thereof when it is alleged the said crime of willful murder was committed by the said Robert Rosenbluth and Roland R. Pothier, the appellant.

9. The order of the District Court of the United States for the District of Rhode Island from which the said Roland R. Pothier, appellant, appeals is as follows:

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF RHODE ISLAND.

Law No. 1532-C.

In re Petition of ROLAND R. POTHIER for Writ of *Habeas Corpus.*

Order.

This cause came on to be heard upon the petition order to show cause why the writ should not issue, the oral objections of the respondents and the United States to the sufficiency of said petition, and upon the evidence introduced in the correlative matter of the petition of the United States Attorney for warrant of removal of the said Roland R. Pothier, was argued by counsel and upon consideration thereof, it appearing (1) that said petition failed to state sufficient grounds for the granting of the writ of *habeas corpus*, and (2) that the imprisonment, restraint and detention of said Roland R. Pothier were in accordance with law it is hereby ORDERED, ADJUDGED AND DECREED that the petition for writ of *habeas corpus* be and the same hereby is denied and dismissed.

Entered as the order and decree of this court January 30, A. D. 1923.

THOMAS HOPE,
Clerk.

Enter as of January 11, 1923.

ARTHUR L. BROWN,
United States District Judge.

DAVIS G. ARNOLD,
Counsel for Appellant.
1002 Union Trust Building, Providence, Rhode Island.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

ROLAND R. POTHIER, *Appellant*,

against

WILLIAM R. RODMAN, *United States Marshal*, and HENRY C. HART, *United States Commissioner*, *Appellees*.

Davis G. Arnold, being duly sworn, deposes and says:

1. I am the counsel for the appellant, Roland R. Pothier, in the above-entitled cause. I further state that I have examined the case of the said appellant and believe that he has a just cause for appeal, and I verily believe that because of his poverty said appellant is unable to pay the costs of said appeal or to print the record therein or to give surety for the same.

2. That the appellant herein made a motion before the District Court of the United States for the District of Rhode Island to allow him to prosecute his appeal before said court *in forma pauperis*, and that said court, upon hearing said motion and on January 31, 1923, issued an order allowing the appellant herein to prosecute his appeal in the above-entitled cause *in forma pauperis*.

3. That the appellant herein is without funds and that his friends and relatives have expended to their limit large amounts of money in the defense of the appellant, he having been arrested twice for the same offense.

4. That the appellant herein has been confined in the Providence County jail since his arrest in this case and his

relatives and friends, principally the American Red Cross, have been providing for the support of his sickly wife and child.

5. Unless the appellant is permitted to proceed *in forma pauperis* for a review in this Honorable Court of the above-entitled case he will be utterly unable to rectify what counsel respectfully believes was a denial of appellant's rights to a writ of *habeas corpus* and a writ of certiorari.

DAVIS G. ARNOLD.

Sworn to before me this 24th day of February, 1923.

[Seal of C. Elmore Cropley, Notary Public, District of Columbia.]

C. ELMORE CROPLEY,
Notary Public, District of Columbia.